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WORK OF THE MISSISSIPPI SUPREME COURT FOR SEPTEMBER 1939, AND MARCH 1940, TERMS

WORK OF THE 1940 SESSION OF THE MISSISSIPPI LEGISLATURE
Gerard H. Brandon

BIOGRAPHICAL SKETCH
W. H. Watkins

November, 1940

VOLUME XIII NUMBER 1

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Mississippi Law Journal

VOLUME XIII NOVEMBER, 1940 NUMBER 1

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VOL. XIII NOVEMBER, 1940 No. 1

THE WORK OF THE MISSISSIPPI SUPREME COURT FOR THE SEPTEMBER 1939, AND THE MARCH 1940, TERMS

I.

STATISTICAL SURVEY

*Stanny Sanders**

Table I of this survey was prepared by Hon. Tom Q. Ellis and Hon. E. L. Shelton, Clerk and Deputy Clerk, respectively, of the Supreme Court. This table was compiled from the original records of the Court, and the writer gratefully acknowledges the assistance given him by the compilers. The other tables appearing herein were compiled from the cases carried by the Southern Reporter and contain only the cases therein reported.

Table II shows the disposition of the cases upon appeal and the Justice who wrote the opinion.

Table III is a topical analysis of the cases, by reference to the Justice writing the opinion. It should be borne in mind while consulting this table that the topic under which a case has been entered is not necessarily the only point involved or decided in the case, but it was necessary in many cases to draw an arbitrary line for the sake of tabulation.

Table IV shows the dissents and special concurrences.

Table V includes only the cases that were reversed and shows the reason for reversal. It was necessary to use broad classifications and to include only those errors that were responsible for reversal in two or more cases.

---

*Co-editor, Mississippi Law Journal.

TABLE I

Cases on the Docket at the Opening of September 1939 Term	130
Cases on Docket at Adjournment June 1940	30
Motions Handled by the Court	115
Cases decided Without Written Opinion	49
Cases disposed of for failure of appellant to prosecute appeal	49
Suggestions of error filed	124
Suggestions of error overruled	3
Suggestions of error pending on Adjournment	21
Cases Decided in which Opinion was written	325
Opinions written on Suggestion of Error	18
Opinions written on Motions	6
Cases Disposed of on Motion (Motions to Dismiss, Cases compromised and settled, Motions to Docket and Dismiss, etc.)	34
Total Cases Handled By The Court	457

TABLE II

	Anderson, J.	Ethridge, P. J.	Griffith, J.	McGehee, J.	McGowen, J.	Smith, J.	Per Curiam	TOTAL
Affirmed	26	41	25	36	35	25	47	235
Affirmed and Remanded	---	---	---	1	---	2	---	3
Affirmed on condition of Remittitur	1	---	---	---	---	---	---	1
Affirmed in part, and Reversed and Remanded in part	---	---	2	1	---	1	---	4
Affirmed in part, and Reversed and Rendered in part	---	4	1	---	---	---	1	6
Reversed and Remanded	11	8	15	11	6	6	---	57
Reversed and Rendered	7	7	10	9	14	9	---	56
Appeal Dismissed	---	---	---	1	1	2	---	4
Suggestion of Error Sustained	---	2	---	2	3	---	---	7
Suggestion of Error Overruled	1	1	6	2	---	---	2	12
Motions Sustained	1	1	1	1	---	---	---	4
Motions Sustained in Part, Overruled in Part	---	---	1	---	---	---	---	1
Motions Overruled	---	---	---	2	1	---	---	3
Affirmed in part, Reversed and Rendered in part, and Reversed and Remanded in part	---	---	---	---	---	1	---	1
TOTALS	47	64	61	66	60	46	50	394

TABLE III

	Anderson, J.	Ethridge, P. J.	Griffith, J.	McGehee, J.	McGowan, J.	Smith, C. J.	Per Curiam	TOTAL
Agency	---	---	---	---	---	---	---	---
Appeal & Error	---	3	6	6	3	1	---	19
Attorney & Client	1	---	---	---	1	---	---	2
Automobiles	---	---	1	3	2	5	---	11
Banks & Banking	---	---	1	---	---	---	---	1
Bills & Notes	1	1	1	---	---	---	---	3
Carriers	1	---	3	---	---	2	---	6
Constitutional Law	---	---	---	---	---	---	1	1
Contracts	1	2	3	2	3	1	---	12
Corporations & Partnerships	1	---	---	3	1	1	---	6
Counties & States	---	3	1	---	1	1	---	6
Criminal Law	7	12	8	14	11	11	---	63
Damages	1	---	---	---	---	---	---	1
Elections	2	---	2	---	2	2	---	8
Eminent Domain	2	1	3	2	---	---	---	8
Equity	---	1	2	---	1	---	---	4
Evidence & Witnesses	3	3	1	2	1	1	---	11
Homesteads	---	1	---	---	---	---	---	1
Infants	2	2	1	1	---	---	---	6
Insurance	---	2	4	5	1	---	---	12
Intoxicating Liquors	1	5	---	3	5	1	---	15
Marriage & Divorce	1	---	---	2	---	1	---	4
Master & Servant	2	5	2	2	---	---	---	11
Mortgages	2	---	---	3	1	---	---	6
Municipal Corporations	1	4	4	2	3	1	---	15
Officers	1	---	1	---	---	1	---	3
Practice & Procedure	1	3	1	2	2	2	---	11
Railroads	1	---	3	1	2	---	---	7
Real Property	2	4	4	1	5	6	1	23
Remedies	3	1	1	1	---	2	---	8
Sales	1	---	3	---	---	---	---	4
Schools & School Districts	---	---	1	---	1	1	---	3
Statutes & Statutory Construction	1	---	2	1	4	---	---	8
Taxation	2	5	2	6	---	3	---	18
Torts	2	2	2	2	4	2	---	14
Trusts	1	---	---	---	1	---	---	2
Wills, Executors, & Administrators	2	4	---	3	4	1	---	14

TABLE IV

	Dissents with Opinion	Dissents without Opinion	Concurs in another Dissent	Concurs specially with Majority	Partly Concurring, partly Dissenting
Anderson, J.	4	2	2	---	2
Ethridge, P. J.	4	1	3	2	---
Griffith, J.	3	3	4	---	1
McGehee, J.	2	2	---	---	1
McGowen, J.	2	---	3	---	2
Smith, C. J.	4	1	3	2	1

TABLE V

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Verdict not Warranted by Evidence	7
Improper Admission of Evidence	6
Improper Instruction	6
Defective Pleading	5
Improper Exclusion of Evidence	4
Excessive Damages	3
Improper Parties	3
Motion for Directed Verdict Improperly Sustained	3
Failure to prove Venue	2

*It is evident that this classification is sufficiently broad to include errors otherwise designated in the remaining subdivisions of the table. However, there is no overlapping, and this general classification as here employed includes only those errors not susceptible to more specific description.

II.

APPEAL AND ERROR

*James A. Blalock**

Before instituting a suit in any court, the careful practitioner reviews the pertinent rules of law to ascertain whether his client has a valid right of action, whether that cause of action has been barred by any supervening occurrence or lapse of time, what evidence he may introduce to prove his case (and how he must go about introducing it), what questions the court will consider (and how he must raise them), and what decision the court will or can make at the termination of the proceedings.

And, though strangely enough we seldom consider it in that manner, an attorney must consider those same questions when, after an adverse decision in the lower court, he institutes that "new suit"[1] which is commonly called an appeal. However, the rules which he must this time consider are not those that prevail in the trial court, but the entirely different rules that are applied by the appellate court.

It is proposed herein to consider the decisions rendered on questions of "Appeal and Error" by our Mississippi Supreme Court during the past year. Within this period, the Court has passed upon a large number of diverse questions relating to this field of law; and therefore, in considering these decisions, let us follow the above outline of the points to which an attorney, preparing a case for appeal, must direct his attention.

A. Who May Appeal

First among the questions that must be considered in determining whether a right to appeal exists is, of course, the question whether the party has such standing in court as will entitle him to complain that he is aggrieved by the decision of the lower court. Usually the rule is simple and easy to apply, since any person who has a present interest in the subject matter of the litigation and who is aggrieved by the judgment, order, or decree may appeal therefrom.[2] In practice, this generally means that any party to the proceedings may appeal; and during the past year there has been but one decision touching this point.

---

*Member Mississippi and Hinds County Bars; Jackson, Mississippi.

[1]Technically, a "writ of error" is generally regarded as the bringing of a new suit; while an "appeal" in equity cases is generally held to be a continuation of the original suit. In some jurisdictions, however, the statutory appeal is in the nature of a substitute for the writ of error, and is in effect a new suit. See Miss. Code Ann. (1930) §12; 2 Am. Jur. 845, §4; Taintor, *Restitution of Property Transferred Under Void or Later Reversed Judgments* (1936) 9 Mississippi Law Journal 181.

[2]See 2 Am. Jur. 950, §161; 4 C. J. S. 343, §169.

In the case of *Hancock County v. State Highway Commission*, [3] the county instituted a mandamus suit to compel the commission to allow it certain money that the county had expended in building a bridge. The lower court dismissed the petition for mandamus, and the county appealed. The appeal was dismissed, the Supreme Court saying:

> "Under these principles and authorities, we think it is clear that Hancock County had no right to institute the suit for mandamus, and that the appellant, Hancock County, had no such interest or right as would enable it to appeal from the order of the court below dismissing the proceeding."[4]

Apparently the Court decided that Hancock County was not entitled to prosecute an appeal because it was not aggrieved by the lower court's decision. But, it is hard to understand or accept a rule which deprives the sole complainant in an action (the suit not even having been brought in the name of the state, and that being one reason for denying the right to mandamus) of the right to appeal from an adverse decision. And, indeed, the Court itself must have been uncertain about the rule it was announcing, since it really granted an appeal, in that it first passed upon the merits of the case by deciding that the county had no right to maintain a mandamus proceeding, and for that reason it is suggested that the Court's language is misleading and not to be entirely relied upon.[5]

B. Time Within Which Appeal Must Be Prosecuted

Section 2323 of the Code of 1930 provides that "Appeals to the Supreme Court shall be taken within six months next after the rendition of the judgment or decree complained of", with the usual saving clause as to persons under a disability. And, in accordance with the universal trend of judicial opinion, that statute has been interpreted as meaning that time thereunder begins to run only after a *final* judgment.[6] However, the usual trouble and confusion has arisen in Mississippi both in determining what judgments are final,[7] and in deciding when they become effective as

---

[3] 193 So. 808 (Miss. 1940).

[4] *Id.* at 810

[5] But it is to be noted that the judgment of the court was not "affirmed", but "appeal dismissed".

[6] On this general proposition see 3 Am. Jur. 146, §429; 2 *id.* 858, §21; 4 C. J. S. 899, §440.

[7] On the question of what is a final judgment, it is said in 2 Am. Jur. 860 §22 that: "A judgment, order or decree, to be final for purposes of an appeal or error, must dispose of the cause, or a distinct branch thereof, as to all the parties, reserving no further questions or directions for future determination." See Connell v. Canauve, 120 Miss. 567, 81 So. 793 (1919).

final judgments.[8] Perhaps this confusion has resulted from the fact that a judgment may be a final disposition of the case as to some of the matters or parties involved without being such a final decree as will set in operation the statute limiting the time within which an appeal may be taken.

This distinction is brought out clearly in the recent case of *Mulholland v. Peoples Bank of Biloxi*.[9] Mulholland instituted an action on a purchase money note and to enforce a vendor's lien against the original purchasers, who executed the note, and against the bank, which had subsequently acquired the property. On April 2, 1938, the chancery court entered a decree dismissing the suit as to the bank, and taking the cause under advisement as to the other defendants. On April 9, 1938, the chancellor entered a decree in favor of the complainant and against the other two defendants; and on October 7, 1938, the complainant filed an appeal bond and appealed from the decree dismissing the bank. It is to be noted that this appeal was taken more than six months after the dismissal, but less than six months after the last decree. The bank's motion to dismiss the appeal was overruled, the Court saying:

> ". . . the [lower] Court was without power in vacation to do any act that could change the finality of the decree by which the suit had been dismissed as to the appellees. That fact, however, is not controlling as to when the statute of limitations, Section 2323 of the Code of 1930, begins to run."[10]

Citing the earlier similar case of *Dickerson v. Western Union Telegraph Co.*,[11] the Court continued:

> ". . . the finality of the judgment or decree rendered in favor of some defendants in advance of the final disposition of a case as to others is not always the test as to when the limitation as to taking an appeal commences to run.
>
> "In the case at bar it appears that the alleged rights and liabilities of the several defendants were so interwoven and connected that the appeals should not be taken by piecemeal. . . As to requirements for a final decree, see Section 614, Griffith's Chancery Practice."[12]

---

[8]Where the statute provides that appeals shall be taken within a certain time from the rendition of the judgment, order, or decree, the date of the judgment, order, or decree is not necessarily the date of its rendition; and where an order, after signature, remains in the possession of the judge unannounced and unpublished until he files it with the clerk, the time of filing will be considered the time of rendition, and not the time and date of its signature by the judge. Cresswell v. Cresswell, 164 Miss. 871, 140 So. 521 (1932). See also 3 Am. Jur. 147, §430.

[9]192 So. 308 (Miss. 1939).

[10]*Id.* at 309.

[11]111 Miss. 264, 71 So. 385 (1916).

[12]192 So. 308, 309, cited *supra* note 10.

The decision that time began to run only after the entry of a decree that disposed of the entire controversy is thoroughly in accord with the views heretofore expressed by the Mississippi Supreme Court and the courts of other jurisdictions;[13] but, as may be concluded from the language used above, a different rule is applied where the interests of the parties who have been dismissed are not at all connected with the matters remaining unsettled.[14]

C. "Evidence" That Will Be Considered By An Appellate Court

It will, of course, be evident that this topic and the following one (what "questions" the appellate court will consider) are closely related, because the Supreme Court will obviously consider only evidence relating to questions that may be passed upon by the Court, and it cannot well consider any question unless it has before it sufficient and proper "evidence" to enable it to reach a decision thereon.

The "evidence" that the Supreme Court will consider consists of, and is called, the "record". Under common law, the pleadings, instructions, and judgment or decree in the lower court were *per se* a part of the record on appeal; and other, and extraneous, matters could not and would not be considered unless made a part of the record by a bill of exceptions.[15] Here in Mississippi, by virtue of several statutes,[16] the procedure is simpler, since we can use the stenographer's transcript of the evidence and proceedings during the trial to make everything occurring during the trial (except such as would not appear in the transcript) a part of the record; but to do this, we must comply with certain "procedural" requirements.[17]

The first requirement set forth by our Mississippi statutes[18] is that notice to the court reporter to prepare the transcript must be given by the party desiring same within ten days after the adjournment of the term at which the judgment is entered. In the case of *Jackson Opera House Co. v. Cox*,[19] a motion was made in the appellate court to strike from the record the stenographer's notes of the testimony taken in the court below on the ground that this notice had not been given within the required time. The Court sustained the motion, citing *Mayflower Mills v. Breeland*,[20] to the effect that:

---

[13]See 2 Am. Jur. 866, §27; Notes (1932) 80 A. L. R. 1192, (1938) 114 A. L. R. 795.

[14]See Note (1932) 80 A. L. R. 1192.

[15]For a general discussion of the contents of the record on appeal, see 3 Am. Jur. 209, §567; and the recent comment in Johnson v. State, 186 Miss. 544, 191 So. 115 (1939) that: "Such matters as may have transpired during the trial of the case and not appearing of record, may be raised by a bill of exceptions, instead of by proof on a motion for a new trial".

[16]Particularly Miss. Code Ann. (1930) §724.

[17]Miss. Code Ann. (1930) §§724-729.

[18]Miss. Code Ann. (1930) §725.

[19]191 So. 665 (Miss. 1939).

[20]168 Miss. 207, 214, 149 So. 787, 788 (1933).

> ". . . The giving of notice to a stenographer to transcribe his notes of the evidence is jurisdictional, and, if not given, the notes cannot be considered."

In this *Jackson Opera House Co.* decision, while discussing the case of *Richmond v. Enochs*,[21] the Court sets forth by way of dictum another important rule regarding the transcript of the evidence, as follows:

> ". . . the only instance in which the transcript which had not been made up in the manner pointed out by the statute shall be treated as a part of the record is when the transcript is made up pursuant to notice given to the stenographer within the time required by law, and is then not "incorrect in some material particular."[22]

This last mentioned rule is applied in the case of *Furr v. Brookhaven Creamery Co.*[23] Furr instituted an action for damages against the Brookhaven Creamery Company and Hugh Nettles, alleging negligence on the part of Nettles as the agent or servant of the creamery. A peremptory instruction was granted the creamery at the close of the plaintiff's evidence, and the plaintiff later took a nonsuit as to Nettles and appealed from the lower court's ruling. The appellee then moved to strike the transcript from the record because the stenographer transcribed only the evidence introduced before the granting of the peremptory instruction; and because the plaintiff's (appellant's) attorneys failed (as required by Code Section 726) to examine and correct the record within ten days after it was delivered by the court reporter and to indorse thereon a certificate that a copy thereof had been delivered to the appellee's (defendant's) attorneys.

The Court stated that because of noncompliance with Section 726, the transcript would be stricken unless the fault was cured by Section 728 of the Code. This latter section, in brief, provides that if notice to transcribe the notes has been given in proper time, the transcript shall not be stricken unless it is incorrect in some material particular. In this case the Court states:

> "It will not do to hold that evidence offered after a party has been discharged from the court is either to bind him or to be charged against him or to operate in his favor or otherwise affect the ruling of the Court theretofore made."[24]

The Court therefore concludes that the evidence offered after the discharge of the appellee is not material in deciding whether the peremptory instruction was properly granted; and thus, as the transcript was

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[21]109 Miss. 14, 67 So. 649 (1915).
[22]191 So. 665 (Miss. 1939), cited *supra* note 19.
[23]191 So. 684 (Miss. 1939).
[24]191 So. 684, 686 (Miss. 1939).

not materially incorrect, Section 728 compelled its acceptance even though the appellant had not complied with the requirements of Section 726.[25]

Having thus considered the cases in which a transcript may be stricken from the record, it is well to note the effect of such action. In the case of *Jackson Opera House Co. v. Cox*,[26] wherein the transcript was stricken from the record, the Court then went on to hear the case on its merits.[27] In the words of the Court:

> "The notes of the evidence taken by the stenographer were heretofore stricken out, and we cannot refer to them in order to determine what the evidence before the Circuit Judge was. . . .
>
> "We think the Circuit Judge had a right to hear the facts set forth in the petition; and we must presume, in the absence of evidence before him, that the evidence warranted his decision. We cannot look to the notes which were stricken out to determine what this evidence was."[28]

In the above case the Court could not consider the evidence because it had not been made a part of the record. On the other hand, regardless of the extent and contents of the record, it should be remembered that the Court will consider only those matters therein that relate to the particular questions and are binding upon the parties then before it; and, in any event, that it will consider only matters that arose in the particular case then before it.

In the case of *Furr v. Brookhaven Creamery Co.*,[29] in determining whether a peremptory instruction had been correctly granted, the Court was called upon to decide what consideration should be given to the evidence introduced by the plaintiff and one defendant after the other defendant had been granted the peremptory instruction. On this point the Court said:

> "When the peremptory instruction was granted, the Brookhaven Creamery Company was no longer concerned with the trial between the plaintiffs and the defendant, Nettles. It was no longer concerned with his [Nettles'] liability and upon a motion for a new trial, the question is, did the court err in granting the peremptory instruction at the conclusion of plaintiff's evidence. We think this case has been settled in H. Weston Lumber Co. et

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[25]Some earlier cases on this question are Benjamin v. Va. Carolina Chem. Co., 126 Miss. 57, 87 So. 895 (1921); McBee & Gossett v. Cahaba Construction Co., 125 Miss. 227, 87 So. 481 (1921) (notes stricken); Robinson v. McKnight, 133 Miss. 501, 97 So. 811 (1923); Phillips v. Canon, 129 Miss. 656, 92 So. 557 (1922) (notes not stricken).

[26]191 So. 665 (Miss. 1939), cited *supra* note 19.

[27]Jackson Opera House Co. v. Cox, 192 So. 293 (Miss. 1939).

[28]*Id.* at 295.

[29]191 So. 684 (Miss. 1939), cited *supra* note 23.

> al v. Hibbens, 182 Miss. 669, 182 So. 115, 116. . . . [in that case] this court said: 'Error, vel non, in the ruling of the court relieving Joseph Company from liability *must be determined on the evidence then before it, for Joseph Company thereafter had no further concern with the trial of the case and cannot be charged with the evidence thereafter introduced'."[30]

Therefore, in determining the question whether the peremptory instruction had been correctly granted, the Court refused to take any consideration of the evidence thereafter introduced.[31]

In a decision based in a way upon the same reasoning, though in support of a principle that is perhaps more generally recognized, the Mississippi Supreme Court recently refused to consider evidence that had been offered in a different but related case. *Ware v. State*[32] was an appeal by a defendant who had been separately indicted, tried, and convicted of a larceny in which two others, who were separately tried, participated. The question raised, and its answer, are well set out in the words of the Court:

> "In the brief in this case, appellant refers, in his statement of facts, to the evidence which they assert was offered in the separate trials of Roberts and Holt. We shall consider only the evidence offered in the case at bar."[33]

Under such circumstances, it appears perfectly proper to refuse to consider any evidence appearing in any case except the case at bar, leaving aside, of course, the question of *res adjudicata,* when properly raised and presented; but your attention is directed to another recent decision refusing to take cognizance of the facts in other cases. In *Malvezzi v. Gully,*[34] the Court said:

> "We are cited to opinions of this Court in other cases where the facts are not recited in the opinion, with the statement that those cases held the proof insufficient to sustain the judgment, and that the plaintiff's case is no stronger on its facts than the cases cited. We cannot look to the facts in any former opinion or decision in this Court in a different proceeding on a different record. Illinois Cent. R. Co. v. Walker, 116 Miss. 431, 77 So.

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[30] *Id.* at 686.

[31] Generally, where a peremptory instruction, directed verdict, motion for nonsuit, etc., is granted, the appellate court takes into consideration only the prior evidence; but where the motion is refused, the appellate court may take all of the evidence into consideration in determining the correctness of the refusal. See 3 AM. JUR. 394, §852. But there are diverse rules, and sometimes confusion about the rule, where the motion was refused. See 5 C. J. S. 127, §1483; note (1940) 12 MISSISSIPPI LAW JOURNAL 350.

[32] 186 Miss. 533, 191 So. 678 (1939).

[33] *Id.* at 538, 191 So. at 680.

[34] 193 So. 42, 43 (Miss. 1940).

> 191; Interstate Co. v. Jolly, 156 Miss. 199, 125 So. 406, 838, in which cases the principle is discussed and decided. The old adage, 'Every tub must stand on its own bottom', is peculiarly applicable to the facts in a lawsuit. Each case must be determined on its own facts; and we cannot supplement the facts in a particular case by looking to the facts in another case. So far as any such evidence is concerned, the facts in other cases are only examined in order to determine the conditions under which principles of law are announced and applied. . . . Furthermore, in many cases two or more reasonable conclusions may be drawn from undisputed facts, and in such cases the trier of facts in courts of original jurisdiction may draw the conclusion and we are bound by it."

The difference between the appellant's contentions in this case and the preceding case is worthy of notice. In the preceding case, the appellant wanted the Court to take the facts proved in another case and use those facts as the basis of decision in his case; while here, in order to show the Court that a certain rule of law applied to his case, the appellant pointed out cases where that rule of law had been applied to similar factual situations. Expressing the thought in the words of the old adage quoted above, the appellant did not try to make his tub stand on another tub's bottom; but, instead, he merely pointed out to the Court that his tub, like other tubs, was already standing on its own bottom.

Always, in applying a rule of law, judges have looked to other cases where that rule has been applied and examined the facts there to see whether they resemble the facts in the case being passed upon. Indeed, without this constant reference to factual situations, the true meaning and application of many rules of law would not be understandable; and it is to be noted that the Supreme Court, in this opinion, does not refuse to follow that rule. It is regrettable that the Court's words leave the impression that it is refusing to follow this well recognized judicial rule; and it is to be assumed that this impression results from an error in language, and not an error in decision. The Court must have meant either (a) that the other reported decisions did not state the facts of the cases, and the Court could not delve back into the records to ascertain them; or (b) that similarity of evidence presented in the trial court in another case will not compel a similar decision in the Supreme Court now if the findings of fact by the trial court are different in the two cases.

D. What "Questions" Will the Court Consider On Appeal?

It avails little to perfect an appeal unless the Court will hear, and pass upon, the questions that you wish to raise, and consider the matters wherein error is alleged to have occurred.[35] A study, therefore, of the questions and matters that will be considered and passed upon by an appellate court is of utmost importance. There are some general rules to which attention must be paid, and after that it would appear convenient to direct attention to questions which may be raised for the first time on appeal, and then to questions which will be considered by the appellate court only if properly and previously raised in the court below.

(1) Generally

Since the "evidence", or record, that the Court will consider, and the questions that it will pass upon are closely related, we have already approached this problem in discussing the transcript of the evidence. From the *Jackson Opera House Co.* case it is of course evident that when the transcript is stricken from the record, the appellant is no longer able to avail himself of any alleged errors of the lower court which only appear in, or can only be shown by, the transcript of the evidence; and that he is confined, as grounds of objection, to those errors apparent on the face of the remaining (and common law) "record" of the trial.[36]

In cases where there is no transcript of the record there may be nothing before the Court to show the errors that are complained of. And, on the other hand, with the transcript of the evidence before it, and numerous assignments of error to point out the matters complained of, the Court may refuse to consider the questions presented because the case was insufficiently developed in the trial court. To this effect is the statement in *Board of Levee Commissioners v. Parker.*[37]

> "It is apparent from what has already been said that the facts as now before us have not been covered or developed sufficiently that the court may proceed to an adjudication. In such a

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[35]The Supreme Court will not stay or delay its consideration of a question properly before it because of the pendency of other legal proceedings unless their outcome could or would affect the decision in the case then pending. See *In re* Validation of Lincoln County Funding Bonds, 193 So. 26 (Miss. 1940). In this case the Court also makes a clear and interesting distinction between certiorari and appeal to the circuit court; and in similar fashion, the question and matters that can and will be considered on certiorari to a supreme appellate court differ from those that will be considered on appeal thereto.

[36]And this means only the declaration (or complaint), answer, and other pleadings, the instructions; and the orders of the court. See 3 Am. Jur. 210, §568; and last sentence Miss. Code Ann. (1930) §724. As the perfect example of what happens when there is neither a transcript of the record or assignments of error, consult the recent decision in Steele v. State, 191 So. 820 (Miss. 1939).

[37]193 So. 346, 348 (Miss. 1940).

> case, the duty of a chancery court is to require a full development of the facts, and of this court to remand that it may be done. All this was fully discussed in More v. Sykes' Estate, 167 Miss. 212, 149 So. 789."[38]

Further, as a matter of wisdom, since its decision in such cases could serve no purpose, an appellate court refuses to consider what we commonly denominate as "moot" cases.[39] Of course, if the case was "moot" at the beginning, the lower court should have refused to consider it; but, generally, it is only the action of the lower court, or some after occurring event, that makes the case "moot".

The simplest type of "moot" case is where mere lapse of time renders decision of the question unnecessary. Such a situation occurred in *Moran v. Murphy*.[40] That was a mandamus proceeding to compel the board of supervisors of Hancock County to order an election to fill a vacancy in the office of county prosecuting attorney caused by the death of the official, it being alleged that the unexpired term would end on the first Monday in January, 1940. The plaintiff appealed from an unsatisfactory judgment, but the case did not come up for decision in the Supreme Court until January 22, 1940; and the Court then stated:

> "The issue presented by the pleadings is now a moot question. Therefore, without regard to whether or not the judgment of the court below was erroneous on the date when rendered, the appeal must be dismissed."[41]

Notice that in these "moot" cases, it makes no difference whether the lower court acted properly or improperly, because by the time the problem is presented to the Supreme Court the controversy has already been settled or the reason for the suit has ceased to exist. And, the attitude and action taken by the Court are the same whether it is the whole case that is "moot" or merely one of the questions presented therein; although under the latter circumstances it is only the "moot" *point,* and not the whole case that the Court refuses to consider.

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[38]Compare the action of the Court in the Parker case (where the record was clear, but the facts not fully developed) with its action in the recent case of Miss. Cottonseed Products Co. v. Harris, 192 So. 439 (Miss. 1939), wherein the facts had been fully developed but the record was not clear. The plaintiff sued for injuries received when a board "runway" on which he was walking collapsed. At the trial a duplicate of the board was introduced in evidence, and in their testimony about locations on the "runway" the witnesses merely pointed to it and used the words "here" and "there". In its opinion the Court said: "The jury and parties concerned in the trial could see the board and knew what was being demonstrated, but we can not get a very clear picture of the situation from the record and must presume that they had proper visual evidence to enable them to fully understand the matter".

[39]See 3 AM. JUR. 308, §733.

[40]193 So. 29 (Miss. 1940).

[41]*Ibid.*

In *Eiland v. Castle*,[42] the trustee under a deed of trust on personalty had taken possession of the property, was proceeding to foreclose thereon, and had advertised the property for sale. The grantor in the deed of trust replevied the property, giving a forthcoming bond therefor; but the trial court found in favor of the trustee. Among the problems presented to the appellate court for decision was the question whether the proposed advertisement and sale would have been void if the sale had taken place. Although the Court considered and passed upon the other questions presented (the validity of the deed of trust and the right to possession of the property), and affirmed the judgment of the lower court on those points, it did not pass upon the validity of the advertisement and intended sale, but said:

> "The sale did not take place. The replevin suit stopped it. We do not reach the question whether it would not have been valid if it had taken place as advertised."[43]

In the above case, it was the action of the trial court alone that made the question moot. In *Dantzler v. Mississippi State Highway Commission*,[44] after the trial court's refusal to act, it was the subsequent action of another court and of the defendant that made the case "moot". There, a property owner sought a writ of prohibition to restrain the Highway Commission from condemning his land. The trial court refused to grant the writ, and pending appeal to the Supreme Court, the eminent domain court proceeded to a final judgment condemning the property; and in addition the Highway Commission constructed a highway thereon and opened it to the public.[45] On motion of the commission, the Supreme Court dismissed the appeal, saying:

> "In other words, the landowner's petition for a writ of prohibition, which has been denied by the circuit judge, avails him nothing on appeal unless the Supreme Court reverses the judgment appealed from before final judgment in the eminent do-

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[42]186 Miss. 513, 191 So. 492 (1939).

[43]*Id.* at 518, 191 So. at 493. Of course the Court had another reason for refusing to consider this question: "As between the appellant [plaintiff] and the trustee in the deed of trust, the latter was entitled to the possession of the property for the purpose of foreclosure. If the manner of advertisement and the place of sale fixed were both or either, unauthorized by law, and if consummated void, it would not follow that appellant was entitled to the possession of the property as against the trustee. For any injury thereby resulting to appellant, he would have his remedy, but not replevin."

[44]193 So. 4 (Miss. 1940).

[45]This action was taken under MISS. CODE ANN. (1930) §1510 which provides that "if the judgment of the circuit judge be to deny the petition, the appeal aforesaid shall not operate as a supersedeas, and the court of eminent domain may nevertheless proceed".

main court. In such a case, if the land owner has a remedy, it is elsewhere—not by prohibition."[46]

This last comment of the Court serves to remind us that while in some "moot" cases the whole controversy, and plaintiff's rights, have ceased to exist (as in *Moran v. Murphy, supra*), in many cases only the grounds of that particular action have vanished, and the plaintiff still has certain rights which may be enforced in another proceeding, of a different type.

(2) Matters Which May be Raised for the First Time on Appeal

It is generally held that the question of lack of jurisdiction may be raised at any time—even, for the first time, on appeal;[47] and the Mississippi Supreme Court recently reiterated this rule in *Johnson v. State*.[48] The defendant was convicted of petit larceny in the circuit court on appeal from a justice of the peace court, although there had been no proof that the alleged offense was committed within the district of the justice of the peace court from which the case was appealed. The Supreme Court reversed and remanded the case, saying:

> "Proof of venue in criminal cases is jurisdictional, and the failure to make such proof may be objected to for the first time in the Supreme Court."[49]

Notice should be taken of the fact that while proof of venue is necessary to jurisdiction of the subject matter in criminal cases, it is not a jurisdictional necessity in civil cases, and the right to object on grounds of wrong venue in civil cases will generally be deemed waived by failure to object in the lower court.[50]

Just as the contention that the lower court had no power to consider the case may be made for the first time in the Supreme Court, so the question whether the declaration (or complaint) stated any cause of action for the Court to consider may be raised for the first time on appeal in certain cases.[51] In *Paine v. Mikell*,[52] the complainant alleged that he

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[46]193 So. 4, 5 (Miss. 1940), cited *supra* note 44.

[47]This statement is clearly the rule as regards jurisdiction of the subject matter. As to jurisdiction over the person, objection must be made in the lower court at the time of appearance, or else it is deemed waived. Likewise questions of jurisdiction as between law and equity, and as between state and Federal courts ordinarily must be first raised in the lower court. See 3 AM. JUR. 67, §304; 4 C. J. S. 505, §258.

[48]186 Miss. 544, 191 So. 115 (1939).

[49]*Id.* at 548, 191 So. at 116.

[50]See 3 AM. JUR. 104, §369.

[51]As a general rule, questions as to the sufficiency of pleading cannot be raised for the first time on appeal; but this rule is limited to purely formal defects and does not apply where the contention is that the pleading wholly and absolutely fails to state any cause of action at all, or that it is otherwise incurably defective. 3 AM. JUR. 75, §317.

[52]192 So. 15 (Miss. 1939).

had contracted with Brown, the agent of the defendant, to purchase certain lots from the defendant, and exhibited a certain memorandum signed by Brown, which failed to give a good description of the property or to state that it was made on behalf of the defendant Paine. The complainant sought specific performance or damages for breach of contract, and there was a *pro confesso* decree and judgment for damages in the lower court, from which the defendant appealed.

The appellant contended that the memorandum exhibited by the complainant did not comply with the Statute of Frauds.[53] The Court states that the memorandum was insufficient, and then says:

> "It is contended, however, that since the appellant did not appear and plead the statute, Section 3343, supra, the point cannot be raised here on appeal."[54]

The Court does not state whether that is the correct rule, but it is universally held that the Statute of Frauds, like the Statute of Limitations, is a personal defense which is waived if not pleaded—and that it cannot be raised for the first time on appeal.[55] It is assumed, and to be hoped, therefore, that the Court passed over this objection and based its decision wholly on the following statement in the decision:

> "However, as was held by this Court in the case of Pease & Dwyer Company v. Somers Planting Company, 130 Miss. 147, 93 So. 673, the question may be raised here for the first time that the bill of complaint fails to state a cause of action. The suit is one to enforce specific performance of the alleged contract of sale or for relief in the alternative by a decree for damages for the alleged breach thereof. There is no allegation contained in the bill of complaint to the effect that the notes mentioned in the memorandum were ever executed and tendered . . . nor is there any mention of the deed of trust having been executed or tendered. . . A tender of the notes, with the pleading, was essential in order to put the appellant in default . . . in the absence of an allegation that the notes and deed of trust had been once tendered and their acceptance refused."[56]

In the *Mikell* case, the complainant's bill was held insufficient because he failed to allege the tender of performance of his obligations under the contract, the tender being necessary to put the defendant in default. In the "companion" case of *Paine v. Newton*,[57] the requisite allegations as to

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[53]Miss. Code Ann. (1930) §3343.
[54]192 So. 15, 16 (Miss. 1939), cited *supra* note 52.
[55]See 3 Am. Jur. 65, §296.
[56]192 So. 15, 16 (Miss. 1939), cited *supra* note 52.
[57]186 Miss. 844, 192 So. 310 (1939). The facts and the procedure in the lower court were practically the same in both cases.

tender were made, but the Court there held the complaint insufficient because it failed to set forth the provisions or contents of the written contract alleged to have been executed by Brown as agent of Mrs. Paine. The complainant failed to attach to his complaint the original or a copy of the contract sued upon; and it is not clear from the opinion whether the Court based its decision on this failure to attach a copy, as required by Sections 526, 527, Code of 1930, or on the failure to make sufficient allegation of the terms and provisions of that contract, or on both. A decision on the second basis would be easy to support, while the wisdom and propriety of one on the first basis would be doubtful, since apparently this objection should be deemed waived by the defendant's failure to object thereto. The basis of the Court's decision is left for the reader to decide, since the opinion reads thus:

> "Assuming that Exhibit A [the contract, which was not attached to the bill] was in writing, then, that writing was the only basis of this lawsuit, and, not being attached to the bill, rendered it subject to demurrer. See Sections 526, 527, Code of 1930, and the cases of Palmetto Fire Insurance Company v. Allen, 141 Miss. 681, 105 So. 482, 483, 769; Home Insurance Company v. Newman, 147 Miss. 237, 111 So. 455. . . .
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> "The decree pro confesso does not supply material allegations necessary to render it a bill which states a case. The whole case necessarily was based on the omitted written contract alleged to have been executed between Newton and Brown. This contract was omitted from the bill nor were its material terms set forth so as to show liability of Mrs. Paine thereon, especially the authority of Brown. See Griffith's Mississippi Chancery Practice, 166A."[58]

(3) Matters Which Must be Raised For the First Time in the Lower Court

In the interests of speedy justice, and in order that the lower courts may be given an opportunity to correct their own mistakes, appellate courts have generally adopted rules that certain grounds of appeal will not be recognized unless the appellant made a motion for a new trial in the lower court;[59] and, on somewhat the same idea, that rule is in some in-

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[58]186 Miss. 844, 849, 192 So. 310, 311 (1939), cited *supra* note 57. Note that in both this and the former case there were *pro confesso* decrees. It is to be observed that the holding might have been different if there had been a trial on the merits, because evidence brought out at the trial might have cured the defects in the pleading or have made the Court say that the defendant lost or waived his right to object thereto. 3 Am. Jur. 75, §317.

[59]Varying rules as to when a motion for a new trial is required have been adopted by the different jurisdictions. Perhaps the prevailing rule is that such motion is necessary to preserve for review any matter that may be made a ground for such motion. See 3 Am. Jur. 43, §267; 4 C. J. S. 770, §352. The rule is generally different where the trial was by judge, not by jury. 4 C. J. S. 775, §353.

stances so extended that matters not specifically assigned as a ground in a motion for a new trial will not be considered.[60]

The former was the case in *Saenger Theatres Inc. v. Faulk*.[61] Perhaps considering the point so well settled that further or extended restatement of the rule could serve little purpose, the Court directed that the case not be reported in the State Reports, and quite briefly and succinctly said:

> "It is argued that the verdict is against the overwhelming weight of the evidence. The appellant did not make a motion for a new trial, hence the Court cannot take notice of that point. See Flynn v. Kurn, 183 Miss. 413, 184 So. 160, and authorities therein cited."[62]

To the same effect are *Hales v. State,* [63] and *McLendon v. State,* [64] which also point out that not only must a motion for a new trial be made in such cases, but that such motion must also assign the fact that the verdict is against the weight of evidence as ground for that new trial if the appellant wishes to have that question reviewed in the Supreme Court. From the foregoing three cases it will be seen that the rule is the same in both civil and criminal cases on this point.

E. How The Appellate Court Reaches a Decision

(1) How the Court Looks at the Evidence

One ground of appeal, and cause for reversal, constantly urged upon the Supreme Court is that the verdict, judgment, or decree is contrary to the weight of the evidence. What decision the Court will reach on this problem depends, primarily, on the evidence that has been introduced at the trial; but, since inevitably in such cases there is a conflict of evidence, it is frequently the *manner in which the Court looks at the evidence* that, alone, is responsible for the final decision.

In *White's Lumber & Supply Co. v. Collins,*[65] the plaintiff alleged that Temple, an agent of the Lumber Company, assaulted him one Sunday when he refused to sign a deed of trust to secure a debt that he owed the Lumber Company. There was a verdict and judgment against both of the defendants, who appealed on the ground that the verdict was against the

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[60] See 3 Am. Jur. 45, §268; 4 C. J. S. 785, §362.
[61] 193 So. 910 (Miss. 1940).
[62] *Ibid.*
[63] 186 Miss. 413, 191 So. 273 (1939).
[64] 191 So. 821 (Miss. 1939).
[65] 186 Miss. 659, 191 So. 105 (1939).

weight of the evidence. In two very confusing opinions,[66] which confined themselves largely to a discussion of whether an employer could be held liable for the action of an employee on Sunday since the state statutes[67] prohibit work or employment on that day, the Court reversed the judgment as to the Lumber Company and affirmed it as to Temple.

Thereafter Temple filed a suggestion of error, the decision on which is reported in *White's Lumber & Supply Co. v. Collins.*[68] Therein, the Court refused to alter its decision as to him and said:

> "This Court has not the right to set aside a verdict as contrary to the weight of the evidence where there is testimony not improbable on its face, and where the witnesses so testifying have not been impeached in the manner known to the law, and reasonable men could arrive at different conclusions, depending upon their judgment of the capacity of the witness, and his veracity and willingness to respond to the truth."[69]

Whether the case is heard by judge or by jury, and whether the decision is by general verdict or by special finding of the facts, the rule set forth above by the Court is applicable. Evidence of this appears in another recent decision, *World Fire & Marine Ins. Co. v. King,*[70] wherein the Court held that it was bound by the chancellor's finding of the facts, and affirmed the judgment for the defendant.[71]

Thus the Court has again set forth clearly within the past year the well known rules that it applies in passing upon the weight of the evi-

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[66]Instead of being divided into a mere "majority" and "dissenting" group, the judges found that they held widely divergent opinions. As a matter of fact, the vote was as follows: (1) For affirmance as to servant, 3. (2) For peremptory instruction for master, 2. (3) For reversal of whole judgment, 3 (this includes one who voted for the peremptory instruction). (4) For affirmance as to master, 2 (this is not stated, but must have been so). It is apparent that the Court was split 3 to 3 on liability of servant; and, under the usual rule, the judgment as to him was affirmed. In the case of the master, examination of the vote will show 4 favoring reversal as to him (which was the decision of the court, of course).

[67]Miss. Code Ann. (1930) §1131. It would appear (see dissenting opinion, White's Lumber & Supply Co. v. Collins, 186 Miss. 659, 676, 191 So. 105, 108 (1939) that the Court regarded the Sunday statute as creating a presumption that Temple was not acting in the scope of his employment, which presumption placed an additional burden on the plaintiff that he failed to overcome. (The dissenting opinion even says: "The proof is silent as to whether Temple had any duties to perform on that day.") Therefore, as the plaintiff had not proved one element (the agency relationship) of his case against the employer, the lower court decision was reversed as to it.

[68]186 Miss. 659, 192, So. 312 (1939).

[69]*Id.* at 683, 192 So. at 313. To the same effect are the recent cases of: Lindeman's Estate v. Herbert, 193 So. 790 (Miss 1940). Montroy v. Gully, 193 So. 40 (Miss. 1940); Va. Carolina Chem. Co. v. Jefferson, 186 Miss. 866, 192 So. 306 (1939). An excellent case is Miss. Power & Light Co. v. Tripp, 183 Miss. 225, 183 So. 514 (1938).

[70]191 So. 665 (Miss. 1939).

[71]Judgment was reversed as to one of the plaintiff insurance companies, but on other grounds.

dence. However, it is well to note a recent, and somewhat disturbing opinion by the Court apparently purporting to give weight as evidence to the manner or form in which a party chooses to appeal. In *Tuminello v. Gully*,[72] appellee secured an injunction prohibiting the sale of intoxicating liquor at the defendant's place of business. The defendant appealed, urging that the proof failed to show that he owned or operated the place of business where the liquor was sold. Perhaps the Court's chief, and surely its most interesting, comment about the proof of, or evidence on, those points was in the following language:

> "Moreover, he appeals here with supersedeas, so far as the decree retaining the injunction against the sale of intoxicating liquors at the place of business is concerned; and hence he is not in a position to successfully contend that he is not interested as owner, *even though the oral testimony offered by the appellee on that issue may not clearly establish such ownership.*"[73]

No doubt Mr. Tuminello's comments on the decision were based on those two little words "judgment affirmed" at the end of the opinion. But, while agreeing with him that they are of more than passing interest, it is believed that the words above quoted also need to be discussed. By the appeal, the Court was called upon to pass on the validity of the trial court's judgment, and in so doing it should only look at, and be bound by, the evidence that was before the trial court.[74] The defendant's action in taking an appeal with a supersedeas was something that happened afterwards, and should not be pointed out to support the trial court's judgment.

Further, what is this rule that the court announces? Does the Court mean that the defendant's appeal with a supersedeas *ipso facto* caused him to lose his right to object to the trial court's judgment? Or does the Court mean that the defendant's action in securing a supersedeas made it appear that he was concerned about what happened to the place of business, and therefore he must be interested in it? It would seem most unjust, and improper, to hold that a man's exercise of a right given to him by statute can either deprive him of the very rights which the statute is designed to protect or be used against him as evidence of wrongdoing. And in any event the Court seems guilty of both poor logic and a most unwarranted assumption, since the defendant might very understandably desire a supersedeas, even if he had no interest in the property, in order to protect himself from any possible liability for breach of the injunction by persons over whom he had no control.

The rules above considered (the last one, of course, excepted) which are applied by the Court in determining whether a verdict is contrary to

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[72]193 So. 39 (Miss. 1940).

[73]*Ibid.* Italics supplied. Too much attention could not be called to this part of the Court's statement.

[74]See the Court's own rules, as set on page 20, *supra.*

the weight of the evidence are the same in effect, though not in appearance, as those applied by it in determining whether the lower court erred in granting or denying a peremptory instruction. We have already seen in *Furr v. Brookhaven Creamery Co.*,[75] what evidence the Supreme Court considers in passing on the correctness of a ruling on a motion for a peremptory instruction. And the view that the Court takes of that evidence is shown by the recent decision in *Fannin v. C. I. T. Corporation.*[76] At the conclusion of the evidence in that case, a peremptory instruction was granted in favor of the plaintiff; and the defendant (whose chief defense had been that the blanks in the contract sued upon were not filled in when it was signed, and that they were improperly and incorrectly filled in later by the plaintiff) appealed. The Court reversed and remanded the case, saying:

> "A peremptory instruction was granted appellee; and in reviewing the propriety thereof, all the believable, direct evidence in behalf of appellant must be taken as true, together with all the reasonable inferences in behalf of appellant that may be drawn from the said direct evidence. . . .
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> ". . . The manager of the dealer testified that the blanks had been filled when the contracts were signed; but that testimony disappears when considering a peremptory instruction, for in that situation the testimony of appellant's agent that they were in blank when signed must be accepted as true."[77]

As for the rule in criminal cases, that is given in *McLendon v. State*,[78] in the following language:

> "The rule in regard to the peremptory instruction is the same in criminal as in civil cases, Justice v. State, 170 Miss. 96, 154 So. 265, and that rule, to restate it, is that taking all the evidence in behalf of the state as true, together with all the sound or reasonable inferences that may be drawn therefrom, if there be enough to support a verdict of conviction, the peremptory must be denied."[79]

Although the Court thus states that the rule is the same in passing upon a motion for a peremptory instruction in criminal and civil cases, it is to be noted that in the foregoing criminal case the Court speaks flatly of taking the State's evidence to be true,[80] while in the *Fannin* case, a civil suit, it speaks of taking "all the *believable, direct* evidence" in behalf of the opposing party as true. Therefore, it seems that the rules may be

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[75]191 So. 684 (Miss. 1939), cited *supra* note 29.
[76]192 So. 41 (Miss. 1939).
[77]*Id.* at 43.
[78]191 So. 821 (Miss. 1939).
[79]*Id.* at 822.
[80]See also Creel v. State, 186 Miss. 738, 191 So. 814 (1939).

slightly different and that the rule applied in criminal cases may actually be less favorable to the appellant than the rule applied in civil cases. But it is believed that generally the better, and the better accepted, rule is that the Court is obliged to accept only the "believable" evidence in passing on such motions, and not obligated to accept blindly *all of the evidence.*[81]

(2) Refusal to Reverse For Certain Errors

It should be emphasized that in determining whether to reverse or affirm a judgment, the appellate court looks not merely to those points relied upon as error, but looks also to the remainder of the case to determine whether any other things that occurred during the trial altered the status or effect of the alleged error. Two instances of this situation occurred in *Metropolitan Life Ins. Co. v. Moss.*[82] There the Court held, although its words do not admit well of quotation, that one statement made by a witness (a doctor) should not have been admitted, but that this error in admission of testimony was not ground for reversal because the witness's subsequent testimony so explained and qualified that first statement as to render it nearly harmless. And, in discussing the second ground of appeal, based on objections to the lower court's granting and refusing to grant certain instructions, the Supreme Court said:

> "Some three or four of the instructions granted at the request of appellee are open to technical criticism, but taking all the numerous instructions for both sides together, and reading them as a whole, we do not think it probable that a jury of good intelligence and sound judgment, as the jury is presumed to be, could have been misled as to the real issue or issues upon which they were to pass. And within this reason, we are of the opinion that it was not a reversible error to refuse appellant's requested instruction No. 14."[83]

Another instance of refusal to reverse even though error exists occurs in the case of *Sovereign Camp, W. O. W. v. Durr*[84] wherein the defendant lodge appealed from a chancery court decree reinstating an insurance policy after the death of the assured. The appellant raised the

[81]Distinguish such cases from instances where, in passing upon questions relating solely to pleading and the rights of the parties thereunder, the Court is obligated to accept all of a party's statements as true. Such was the recent case of City of Biloxi v. Gully, 193 So. 786 (Miss. 1940), wherein the city intervened in a suit brought by the Tax Collector to collect money due the city, and protested against the allowance of a fee to him for such collection. The intervening petition was accepted, but the city's offer to prove the facts therein stated was rejected and the Collector was allowed a fee. On appeal by the city, the Court first states that the facts in the petition, if true, would be grounds for refusing to allow a fee; and then decided that in determining the city's right to prove those facts (of which right it claimed it had been deprived), the allegations of the city's petition were required to be taken as true.

[82]192 So. 343 (Miss. 1939).

[83]*Ibid.*

[84]186 Miss. 850, 192 So. 45 (1939).

question whether the complainant should have instituted his suit at law instead of in equity; and the Court decided this point by saying:

> "Moreover, even if the case had not been one of purely equitable cognizance, we would not be justified in reversing on that ground in view of Section 147 of the State Constitution."[85]

III

CONTRACTS AND COMMERCIAL LAW

*James S. Eaton**

A. Contracts

(1) Construction

In *Tyler v. Laurel Equipment Co.*,[1] the appellant, a road contractor, desiring to assist a subcontractor in doing some hauling on the job, gave the subcontractor a statement to the effect that he would "pay 50% of the amount due the party selling and the other 50% of the amount due the party furnishing the trucks." The subcontractor then presented the statement to the appellee, a dealer in trucks, and executed to the appellee an assignment of "50% of my weekly gross earnings," which assignment was accepted by appellant. Under the agreement between appellant and the subcontractor the former, furnishing expenses of operating the trucks, deducted such expense from amounts due the subcontractor for work done. The Court held that the appellant did not, by his statement, agree to pay the seller one half of the gross earnings of the subcontractor, but only one half of the amount due the subcontractor after deduction of expenses. The Court held also that the assignment by the subcontractor to the seller did not obligate the appellant to pay fifty per cent of the gross earnings of the subcontractor, but only one half of such earnings after deduction of expenses, since the subcontractor did not have the right to pass by assignment a greater obligation upon the part of appellant than he originally assumed. Acceptance of the assignment by the appellant did not create a new debt between himself and the seller.

In *Hickman v. Slough*[2] a deceased had agreed, prior to his death, with another person that such person should be paid for personal services after death of the deceased, the amount not being determined. It was held that such person is entitled to recover from the estate of the deceased in quantum meruit for the value of his services.

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[85] *Id.* at 858, 192 So. at 46. Miss. Const. (1890) §147 provides that a judgment or decree of a circuit or chancery court in a civil cause shall not be reversed because of error as to whether the cause was of equity or common law jurisdiction.

*Member Mississippi and Harrison County Bars; Gulfport, Mississippi.

[1] 192 So. 573 (Miss. 1940).

[2] 193 So. 443 (Miss. 1940).

(2) Accord and Satisfaction

In *Metropolitan Life Ins. Co. v. Perrin,*[3] an insurance company, in sending a check in payment of disability benefits, sent with it a memorandum stating the period which the check was intended to cover. A letter from the company referring to the check as a payment in full was not received by the payee of the check until after he had cashed it. The Court held that cashing of the check did not constitute an accord and satisfaction of a claim for disability for a period of time not covered by the memorandum accompanying the check. The Court held also that failure of the insured to tender the amount of this check would not bar prosecution of a claim for disability in a period not covered by the prior payment, since the company was obligated to pay for the other period regardless of the validity of the additional claim.

In *Austin-Western Road Machine Co. v. John A. Spencer, Inc.,*[4] the Court held that release of the surety on a road contractor's bond by the contractor's creditor for an amount less than the sum due the creditor did not bar the creditor's action against the contractor for the balance due after deducting the amount paid by the surety.

(3) Attorney's Fees

In *Fitzpatrick v. Kellner*[5], a testatrix agreed with her agent that in consideration of his services in managing her estate she would bequeath him an undivided interest in her property and would also convey him an undivided interest therein. She executed this conveyance before her death, and in her will she bequeathed to him an undivided interest, leaving the other undivided interest to her heirs. The heirs employed an attorney, upon a contingent fee basis of one third the recovery, to contest the will, neither the heirs nor the attorney knowing about the contract of the testatrix with her agent or her deed to him. The attorney would not have advised contest of the will had he known of such contract and deed. The attorney, having filed the contest and having rendered other services, requested a fee of one third the net estate that the heirs received. The Court held that, in view of the mutual mistake of both the heirs and the attorney at the time of the agreement for the contingent fee, the attorney was not entitled to one third of the amount as fee, but to a reasonable fee for services rendered.

In *Collins v. Schneider,*[6] the owner of land had erected thereon a filling station with the proceeds of a note given a bank and signed by two others as maker and guarantor. This lot was leased to an oil company, and the lease assigned to the bank as additional security for the note. The

[3]192 So. 12 (Miss. 1939). For opinion on former appeal see 184 Miss. 249, 183 So. 917 (1938).
[4]193 So. 336 (Miss. 1940).
[5]193 So. 911 (Miss. 1940).
[6]192 So. 20 (Miss. 1939).

owner later employed an attorney to prosecute a claim against the oil company for additional rentals alleged to be due and for damages to the land. The maker and guarantor of the note, named as complainants in the suit, did not consent thereto, but, with knowledge, did not withdraw. The bank declined to be a party complainant but agreed to be a defendant. A money decree directed that the proceeds be paid to the bank as assignee of the lease. The attorney employed to bring the suit instituted an action to enforce a lien for his fee on the amount paid the bank. The Court held that the attorney's lien on the judgment for the amount of a reasonable fee was not destroyed by the provisions in the decree directing the proceeds to be paid to the bank, and that the attorney had a right to enforce this lien as against the owner of the land, both the maker and the guarantor of the note, and the bank.

(4) Specific Performance—Statute of Frauds

In *Paine v. Mikell,*[7] it was held that in an action for specific performance of a contract for the sale of city lots, entered into by a real estate agent and the prospective purchaser, where the alleged memorandum of the contract referred to notes and a deed of trust, tender of the notes with the bill of complaint was necessary to put the vendor in default. It was also held that a receipt given for a down payment, which failed to state the county and state in which the lots were located or that the receipt was made on behalf of the owner, was insufficient to avoid the Statute of Frauds.[8] The Court also held that ordinarily the authority to act as a real estate dealer for the sale of property does not confer authority on such agent to receive the purchase price of the property sought to be sold.

(5) Assignments

In *Burkett v. Hagerty*[9] it was held that where an assignee sues upon a contract, under which his assignor and two other parties were to receive a certain sum for each gallon of a product sold if they should perform certain conditions precedent, the interest of the assignors being joint and not joint and several, and the bill alleging performance of the conditions precedent, the two other parties were necessary parties in whose absence the validity of the contract would not be determined. An interesting question, not decided, was whether the contract was void as against public policy, since the condition precedent was persuasion of the State Highway Department to use the product in highway construction.

(6) Excuse for Nonperformance

In *Browne & Bryan Lumber Co. v. Toney,*[10] a broker procured for a lumber company a contract for the furnishing of railroad cross-ties, the

[7]192 So. 15 (Miss. 1939).
[8]Miss. Code Ann. (1930) §3343.
[9]186 Miss. 621, 191 So. 411 (Miss. 1939).
[10]194 So. 296 (Miss. 1940).

contract providing that the ties were to be shipped by water and that delivery was to start within sixty days. Because shipment by water became impossible and shipment by other means would prove so burdensome that the contract would result in a loss to the lumber company, the company sold the ties elsewhere and declined to pay the broker his commission. The court held that the fact that the contract might have become so burdensome as to result in a loss did not relieve the seller of the ties of his liability for payment of commissions to the broker.

B. Sales

(1) Sunday Statute—Implied Warranty

In *Johnston v. Swift & Co., Inc.*,[11] it was held that an action for damages to one made ill by eating sausage purchased from a retailer on Sunday, in violation of Sec. 1132, Code of 1930, could not be maintained upon the theory of implied warranty, but that the violation of this statute did not prohibit the maintenance of an action for damages against the manufacturer sounding in tort.

(2) Conditional Sales Contracts

(*a*) *Assignment for Collection*

In *Taylor v. C. I. T. Corp.*,[12] a finance company, before delivering possession of a repossessed automobile to an automobile dealer for resale, required the dealer to deliver to it the conditional sales contract the dealer held on another automobile and gave the dealer a receipt stating that this other contract was being accepted for collection and that the net amount realized would be credited if and when collections were made. The automobile delivered to the dealer being destroyed in an accident, the finance company demanded possession of the automobile covered by the sales contract it had received from the dealer. The Court held that there was an assignment of this sales contract to the finance company for collection, coupled with interest; and therefore, on destruction of the car delivered to the dealer, the company was entitled to possession of the sales contract and the car covered by it until its interest was satisfied. The Court compared the agreement between the parties to the relation of a bailee under a contract by which he is to perform certain services, saying: "The bailee would be entitled to possession of the chose in action and necessarily the proceeds thereof until his interest has been satisfied."[13] The Court also held that parol evidence was inadmissible to vary the meaning of the written receipt, which was held to be contractual in nature.

(*b*) *Alteration of Instruments*

In *Fanning v. C. I. T. Corporation*,[14] the Court stated that the facts,

[11]186 Miss. 803, 191 So. 423 (Miss. 1939).
[12]191 So. 60 (Miss. 1939).
[13]*Id.* at 62.
[14]192 So. 41 (Miss. 1939).

as disclosed by the record, were in more or less confusion, so that a statement of facts was difficult. The case involved an action of replevin for possession of an automobile under conditional sales contract assigned to a finance company, and several principles were announced for disposition of the case after remand. Where the buyer, with intent to execute a contract, delivers the instrument to another with blanks to be filled in, and such other has authority, expressly given or implied by law, to complete the instrument, it is enforceable in the hand of a bona fide holder for value without notice, even though the blanks have not been filled in accordance with the authority conferred; but such bona fide holder, in such instance, must affirmatively show facts entitling him to that position. In this case, the finance company had repossessed the automobile and had left it with the dealer for resale. The dealer resold it to a party who executed a conditional sales contract in blank, which, after being filled in by the dealer, was assigned to the finance company. Later a dispute arose between the finance company and the buyer as to the number of installments remaining due under the contract. The Court held that if the finance company had left the car in the hands of the dealer with the understanding that it be sold as part of the dealer's stock, it thereby clothed the dealer with authority to make a sale in the same manner and with the same consequences, so far as the buyer is concerned, as if the dealer himself had owned the property. The Court said that the facts of the case were not sufficiently developed to determine applicability of the latter rule.

(c) Sales of Repossessed Chattels

In *Brewer v. Universal Credit Co.*,[15] it was held that where the assignee of a conditional sales contract repossessed the automobile covered thereby upon default of the buyer, and then agreed that the car should be stored with a third party for thirty days for redelivery to the buyer if the buyer paid the delinquent installments and storage charges, the buyer was entitled to damages against such assignee and the third party, where they sold the car to another within the thirty days.

C. Liens

In *Turman v. Tupelo Brick & Tile Co.*,[16] where a contractor, under contract to build a house for the owner as a lock and key job, abandoned it before completion and turned it over to the owner, who completed the job, a materialman from whom the contractor bought material but who did not serve any notice on the owner before the contractor abandoned was held to have acquired no lien on the property, and, in the absence of the owner's promise in writing to pay the contractor's debt, the owner was not liable to the materialman.

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[15]192 So. 902 (Miss. 1940).
[16]192 So. 40 (Miss. 1939).

D. Foreign Corporation—Doing Business

In *Watson v. J. R. Watkins Co.*,[17] a foreign corporation which, by contract executed in Minnesota, agreed to furnish a purchaser in Mississippi with its products at wholesale prices for purposes of resale, the contract also providing for return by the purchaser of unsold goods and requiring the purchaser to report sales, was held not to be doing business in the state within the meaning of Sections 4140 and 4164, Code of 1930, since the contract was one of sale and not agency.

In *Case v. Mills Novelty Co.*,[18] however, a foreign corporation which accepted in Illinois a written order from a Mississippi resident for an ice cream dispenser, the contract containing a service agreement, performance of which required employment of a local mechanic, was held to be doing business in the state when servicing the dispenser. Thus the sale was rendered intrastate and void under Section 4164, Code of 1930, since the corporation had not filed its charter with the Secretary of State. It was denied the right to maintain an action of replevin for possession of the dispenser.

E. Bills And Notes

(1) Accommodation Paper

The case of *Hederman v. Cox*,[19] arose upon the following facts. Hederman, the plaintiff, to assist one Hand in obtaining a loan from a bank, gave Hand his accommodation note, payable to Hand. The latter then gave plaintiff his note for an equal amount, there being no indebtedness between them, and the plaintiff agreeing not to use Hand's note as business paper. Hand then pledged plaintiff's note to the bank as security for a loan. On maturity, Hand executed a renewal note to the bank, to which was attached, as collateral, a renewed accommodation note of the plaintiff payable to Hand, the bank believing plaintiff's note represented an indebtedness. After several similar renewals, plaintiff declined further renewals of his accommodation note to Hand. The bank, on this maturity, requested payment and was then told by Hand, for the first time, that plaintiff's note was only an accommodation. The bank, nevertheless, renewed Hand's note several times thereafter, attaching each time plaintiff's accommodation note, then past due, as collateral. Hand became insolvent, and plaintiff, learning that defendant, receiver of the bank, held his note, brought an action for cancellation thereof. The Court held that if plaintiff's note to Hand represented an indebtedness to Hand the plaintiff would have been liable, since there would have been an independent obligation to support it. But since the plaintiff's note to Hand was an accommodation note and since the bank, with knowledge of the fact, re-

[17] 193 So. 913 (Miss. 1940).
[18] 193 So. 625 (Miss. 1940).
[19] 193 So. 19 (Miss. 1940). For a more detailed discussion of this case see (1940) 12 Mississippi Law Journal 506.

newed Hand's note after the maturity of plaintiff's note, it operated to discharge plaintiff from any further obligation to the bank, the plaintiff being in the position of a gratuitous surety. Judge Smith, concurring, reasoned that the plaintiff delivered his note to Hand for use by Hand only as collateral to the bank, which fact was known to the bank when it extended Hand's note. The plaintiff thereby became a surety and was discharged when the bank extended the time of Hand's indebtedness without the consent of the plaintiff. Judge Anderson, dissenting, felt that the case was no different than it would have been had the plaintiff signed Hand's note to the bank as an accommodation maker, in which event plaintiff would not have been released by the bank's extension of the note, even without his consent.

(2) Municipal Bonds

In *Town of Mize v. McIntosh,*[20] it was held that in an action on municipal bonds payable to bearer, a plea that title to the bonds was not good in the plaintiff, but was in another, is insufficient where the plea failed to allege bad faith of the plaintiff in acquiring the bonds, or that the municipality had a good defence to the bonds against the one alleged to be the rightful owner which it could not set up as against the plaintiff.

(3) Usury

In *Fannis v. Edmondson,*[21] the Court held, among other things, that where interest at the rate of ten per cent on a note secured by a deed of trust was charged and agreed to be paid, payments made on the note were to be credited on the principal without interest.

IV.

CRIMINAL LAW

*Oliver M. Hornsby**

An interesting case, receiving the attention of the State Supreme Court at both the September, 1939, and the March 1940, terms is that of *White v. State,*[1] and while all its issues are not confined to the subject of Criminal Law, its history will be found worthy of comment.

Floyd White was indicted for the murder of one William Holiness in Kemper County. On the first trial of the case, there was a hung jury. Upon the second trial, the defendant was convicted of manslaughter and sentenced to the penitentiary for a term of eleven years. From that judgment he prosecuted an appeal and the cause was assigned to Division

[20]186 Miss. 467, 191 So. 489 (Miss. 1939).
[21]192 So. 825 (Miss. 1940).
*Member of Mississippi and Adams County Bars; Natchez, Mississippi.
[1]192 So. 25 (Miss. 1939), 193 So. 910 (1940), *motion to set aside judgment dismissed,* 195 So. 479 (Miss. 1940).

A of the Supreme Court. The appellate court, in reaching its decision, said:

> "There was a motion for a new trial, which was overruled. One of the grounds was that the evidence was insufficient to sustain the verdict. We are of the opinion that a new trial should have been granted on that ground alone. Appellant was not entitled to a directed verdict, but was entitled to another trial, for the reason that the verdict is against the overwhelming weight of the evidence. In a case of that character, the Court under the authority of Section 592, Code of 1930, is authorized to grant two new trials, but no more."[2]

Thus, the case was by Division A reversed and remanded for another trial, such decision being rendered on November 20, 1939. A mandate under said judgment was issued by the clerk of the Supreme Court on November 25, 1939, and received by the circuit clerk of Kemper County two days thereafter, the effect of which mandate required that the defendant be given another trial.

Prior to the expiration of the time limit within which a suggestion of error might be filed in the Supreme Court, the State sought and was granted an additional fifteen days in which to file a suggestion of error, extending such time to thirty days from date of the decision of the court *i. e.*, November 20, 1939. No order was issued recalling the mandate, and on December 20, 1939, the State filed its suggestion of error. Upon a consideration of the suggestion of error the three justices composing Division A of the Court, to which Division the same had been properly directed, were not in accord as to what disposition should be made thereof. Thereupon, the former decision of reversal and remand was withdrawn, the judgment entered thereon set aside and an order entered on February 5, 1940, submitting the cause for consideration by the Court *in banc*. Counsel for appellant and the attorney general for the state were notified that the cause was being submitted to the Court *in banc* and upon their request they appeared and presented oral arguments before Division B, prior to consideration by the Court *in banc*.

Thereafter, on February 26, 1940, the Court *in banc* decided that the judgment of the circuit court of Kemper Court should be affirmed, Justices Anderson and Griffith dissenting. Said the Court:

> "After a thorough consideration of the record, a majority of the Court is of the opinion that the verdict is not against the overwhelming weight of the evidence, but finds ample support therein."[3]

It was not until thereafter that appellant's counsel became advised of the fact that the mandate had been issued on November 25, 1939; had

[2]192 So. 25 (Miss. 1939).
[3]193 So. 910 (Miss. 1940).

been promptly received by the clerk of the trial court, and the case again docketed for re-trial, and that such mandate had not been recalled by any order of the Court prior to the judgment of the Court *in banc* affirming the judgment of conviction and sentence.

Thus, it was, that thereafter upon motion filed by appellant's counsel to set aside the judgment of affirmance, this case made its third appearance before the Court, this time at a subsequent term, *i.e.*, the March 1940 term, the previous two appearances having been at the September 1939 term. For causes whereof the motion to set aside should be sustained, counsel assigned the following grounds: (1) The court was without jurisdiction on February 26, 1940, to render the judgment affirming appellant's conviction of manslaughter, its mandate of reversal and remand having previously issued to the circuit clerk of the trial court and by him received and the cause docketed for retrial, and that mandate having never been recalled or set aside; (2) The mandate not having been recalled or set aside during the term of Court at which it was issued, same could not be disturbed at the March 1940 term, a subsequent term.

The Court sitting *in banc* on the hearing of the motion to set aside the judgment of affirmance quotes Section 3406 of the Code of 1930:

> "Every final judgment or decree rendered in any cause by the Supreme Court shall be certified by the clerk thereof to the clerk of the court from which the cause was brought, or to which it is remanded, within twenty days after the rendition of the judgment, if the costs accrued in the Supreme Court shall be paid to him, including all costs for which he may issue execution. . . . and if the Clerk of the Supreme Court fail to issue the certificate as required, he shall forfeit to the aggrieved party one hundred dollars, to be recovered by motion before the Supreme Court on five days' notice."

The Court made comment that the action of the clerk of the Supreme Court in the pending case was in full accordance with the uniform practice in the absence of any instructions to the contrary. "In other words," says the Court, "the necessity for interpreting and construing the said section 3406, *supra*, with particular reference to when a mandate should be issued in order for the clerk to comply with the meaning of the provisions of said statute is presented for the first time by the motion here under consideration. . . ."[4]

The Court overruled the motion to set aside on the grounds that the mandate in this case had been issued inadvertently or prematurely for the reason that a judgment of the Court does not become "final" within the meaning of the statute quoted until the expiration of the time within which any suggestion of error may be filed, and that a prematurely issued

[4]195 So. 479, 482 (Miss. 1940).

mandate did not divest the Court of jurisdiction and might be recalled. The second cause as to why the judgment should be set aside as assigned by appellant was disposed of by the Court on the ground that the Court at the close of the September 1939 term had entered an order continuing to the March 1940 term all matters not disposed of at the September term, and, consequently the Court still had such power to recall the mandate as it possessed at the previous term; and the whole matter, being still in Court, could be disposed of under an amended or new mandate.

In interpreting the duties of the clerk under Section 3406 of the Code of 1930, the Court said:

> ". . . the construction and interpretation which we think should be given said Section 3406, of the Code of 1930, requiring the clerk of this Court to certify, within twenty days after rendition, every final judgment or decree rendered in any cause herein to the clerk of the Court from which the cause is brought or to which it is remanded, is that he is required to do so within that period of time after any suggestion of error shall have been disposed of, or, if none has been filed, that he shall then certify the judgment and issue the mandate, within the period so prescribed, after the time allowed under the rule for filing a suggestion of error, or the extended time granted under an order of the Court for the purpose, shall have expired."[5]

A. Burglary

In the case of *Woods v. State,*[6] the defendant was indicted and convicted of the charge of burglary of a dwelling house. The proof showed that the house in question, although intended for a dwelling house, had been recently erected and had not yet been occupied as a dwelling and was still vacant. The Court in reversing and remanding the case for a new trial held that burglary of the said house was not such of a dwelling, and further held that burglary of a dwelling and the burglary of an unoccupied house were separate offenses, although of the same classification of crime; and that therefore the indictment could not be amended at the trial, a new indictment properly drawn being necessary.

B. Embezzlement

In *Barry v. State,*[7] the defendant was indicted and convicted of the crime of embezzling $3669.41. The proof shows that the defendant had been employed as a salesman and collector, and the total sum alleged to have been converted was composed of numerous smaller sums at various and different times. The trial court instructed the jury for the State that if they believed from the evidence beyond a reasonable doubt that the

[5] 195 So. 479, 483 (Miss. 1940).
[6] 186 Miss. 463, 191 So. 283 (1939).
[7] 192 So. 841 (Miss. 1940).

defendant "fraudulently and feloniously did take, steal and make away with, secrete, embezzle and convert to his own use without the consent of the said . . . , the said sum of $3669.41, or any part thereof exceeding $25.00 . . . ," then the defendant should be found guilty as charged. The Court held this instruction to be erroneous for the reason that neither it nor any other instruction informed the jury that all of the jurors must agree upon a particular sum or definite and identified item of money. Said the Court:

> "The State did not pick out particular items but the many and entire items shown in the evidence and instructed the jury that if they believed the appellant received in excess of $25.00, and had not accounted for it, that they could convict him. It did not tell the jury, nor did any other instruction tell the jury, that all of the jurors must agree upon a particular sum of money. The jury were left to pick any one or more items amounting to an excess of $25.00 at any time embraced in the evidence, and convict. It was important and vital that the jury be informed that each of them should agree on a particular item or items, constituting the offense."[8]

In a subsequent part of the decision, the Court reverted to this point:

> "The errors discussed run through a number of the state's instructions and for that reason it was highly important that the district attorney in presenting the law should inform the jury that they must unanimously, that is, the entire jury must, agree on the particular offense of which the defendant is believed guilty.
>
> ". . . The State evidently proceeded upon the theory that the offense was a continuous one, but the instructions nowhere gave the jury the information that there must be a continuous series of transactions coupled up so that it in fact was only one, to be relied upon, as to convince them that it was a systematic and continuing embezzlement."[9]

C. Homicide

Any case passed upon by the Supreme Court in which one or more of the Justices dissent from the majority opinion is worthy of notice. In *Lewis v. State*,[10] the defendant appealed from a verdict of guilty and the death sentence. The ground assigned for reversal was the giving of the following instruction for the State:

> "The Court instructs the jury for the State that, if you believe from the evidence beyond a reasonable doubt, that the defendant, Eddie Lewis, armed himself with a shot gun and went

[8] 192 So. 841, 845 (Miss. 1940).
[9] *Id.* at 846.
[10] 195 So. 325 (Miss. 1940).

> to the premises of John Ross with the premeditated design unlawfully and feloniously to kill the said John Ross or some member of his family and that he did so kill the said John Ross in furtherance of such design, then it will be the sworn duty of the jury to find the defendant guilty of murder, even though you may believe from the evidence, that the deceased, John Ross placed his hands on his hips and the defendant believed that his own life was in danger."

The appellant contended the instruction was erroneous for several reasons, among which were that the instruction did not require the jury to believe that the defendant provoked the final difficulty, that it did not embrace any idea of "abandonment," and that it was not a case in which the self-defense estoppel instruction was proper. The Court held, with Justices Griffith and McGowen dissenting, that under the State's evidence in the particular case, the instruction was proper.

In other cases decided by the Court, under somewhat different facts, instructions of like meaning have been criticized and held erroneous as cutting off the right of the appellant to claim self-defense. Thus it would seem that the prosecuting attorney should be well stisfied that the facts in any given case justify such an instruction before requesting same of the Court. In other words, it may be that an instruction will correctly state an abstract principle or principles of law and yet under certain evidence or because of the lack of it be an erroneous instruction in a particular case. This is too little appreciated by the young and inexperienced lawyer and not too closely followed by others.

D. Immunity

By an evenly divided Court, it was held in *State v. Bates,*[11] dealing with gambling laws and an interpretation of Section 1286 of the Code of 1930, granting immunity from prosecution in certain instances, that a grand jury is without power to return an indictment based on books, papers, etc., obtained from an accused by means of a subpoena duces tecum and that where such books, papers, etc., have been obtained from him in such manner he is immune from prosecution under an indictment based thereon by the grand jury *and that this is true notwithstanding that the subpoena was issued and served upon the owner's secretary and bookkeeper.* It was further held that a motion to quash is an appropriate remedy for challenging the validity of such an indictment. The Court said:

> "The question here involved goes to the power of the grand jury to return an indictment in cases where the evidence is so obtained, and is not a question of sufficiency, or competency, or irrelevancy, or evidence before the grand jury, considered as such. The section prohibits the grand jury, after obtaining such evi-

[11] 192 So. 833 (Miss. 1940).

dence, from instituting a prosecution in connection with the matter concerning the witnesses or the documents produced before it. It is the legality of the indictment which is involved, and not the competency or sufficiency of the evidence before the grand jury; . . . the Court will not examine the proceedings of the grand jury merely to see whether they acted on competent evidence, or whether it was legal; or in regard to the relevancy or legality of the testimony given before them. But the legality of their action presents a different question. If they had no power to return the indictment, then the Court, on proper proceedings, may inquire into the matter, and afford to the party affected the necessary remedy to protect him against illegal action. It is a question of the power of the grand jury under the statute, and not of the means in which the evidence was obtained."[12]

E. Innkeepers

In *Easterling v. State*,[13] the defendant was convicted of violating Section 5109 of the Code of 1930, which makes it an offense for any person to obtain food, lodging or other accommodations at any hotel, etc., with intent to defraud the owner or keeper. The affidavit failed to charge and the proof failed to show that the defendant obtained the food and lodging with intent to defraud, the proof simply showing that the defendant had boarded at the hotel for several months and had left owing a balance of $24.33. Under such allegations and proof, the Court, of course, had to again announce the correct rule and discharge the defendant. The Court held that intent to defraud is a material part of the crime involved under the statute, and the omission thereof in the indictment, affidavit or in the proof, is fatal to the prosecution. The practice of prosecutions for "beating a board bill" and "passing a bad check" simply under evidence that the defendant left owing a board bill or that his check turned out worthless is far too prevalent particularly in the justice of peace courts and too often results in the use of the criminal laws and process to force or coerce the payment of a civil obligation.

F. Procedure

In *Roberts v. State*,[14] the defendant had been apprehended in another state and without any legal process therefor, and, over his protest, he was forcibly returned to this state to stand trial for the offense of grand larceny. The point was raised and presented that because of the manner in which the defendant had been brought into the state, that the trial court was without jurisdiction of his person. This question apparently being before the Court for the first time, the Court followed the weight of authority, refusing to accept the minority view, and held that the

[12]192 So. 833, 834 (Miss. 1940).
[13]194 So. 289 (Miss. 1940).
[14]186 Miss. 732, 191 So. 823 (1939).

jurisdiction of the court in the county in which a crime is committed is in no way impaired by the manner in which the accused is brought before it.[15]

G. Searchers and Seizures

In the two cases of *Goss v. State*,[16] the Court was again called upon to announce that where a search warrant has been properly issued under valid affidavit therefor, such action is an adjudication that there was probable cause therefor and that such adjudication is conclusive and cannot be collaterally attacked, as upon the issue between the State and the appellant as to the guilt or innocence of the accused. In distinguishing searches without a warrant on one hand and searches under validly issued warrants, the Court says:

> "The appellant invokes McGowan v. State, 184 Miss. 96, 185 So. 826, but this case is inapplicable here. In that case, the search was made without a search warrant, and in such a case, to justify the search, the information must be sufficient to satisfy the judicial mind that there is probable cause, etc.; but where a search warrant is obtained, probability, or probable cause is judically ascertained by the officer issuing the search warrant, and if an affidavit contains matters of fact sufficient on its face, it will be presumed that the officer inquired into the facts before the issuance of the search warrant; and between the person accused, and the State, the sufficiency of the facts cannot be inquired into on a prosecution based on evidence obtained by the search. Adjudication by a justice of the peace that there is probable cause for the issuance of a search warrant is sufficient, and judicially establishes the fact that there is such probable cause."[17]

Again in *Carr v. State*,[18] decided at the same term as the *Goss* cases, the Court held:

> "The issuing of a search warrant on the affidavit made by the sheriff is res adjudicata of its sufficiency and cannot be here inquired into.
>
> ". . . . That the sheriff failed to inform the appellants of the warrant before searching the automobile does not affect the admissibility of the evidence obtained by him thereunder."[19]

While recognizing the rule that a judicial officer has not the power to try and determine causes while physically out of his judicial district, the

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[15]For authority the Court relied upon 14 Am. Jur. 919 §217.
[16]192 So. 447 (Miss. 1939), 192 So. 494 (Miss. 1939).
[17]*Id.* at 495.
[18]192 So. 569 (Miss. 1940).
[19]*Ibid.*

Court, in *McGowan v. State,*[20] determines that a justice of the peace in issuing a search warrant is not acting "judicially" within the meaning of that rule, and hence may legally issue a valid search warrant while physically in another justice of the peace district.

In *Hathaway v. State,*[21] a unique situation arose. The defendant was convicted of possession of intoxicating liquor on evidence obtained under a search warrant issued by the mayor of the Town of Nettleton, acting as an ex-officio justice of the peace. The Town of Nettleton is on the line between Lee and Monroe Counties, a part of the municipality being in each county. The mayor was a resident of that part of the town which lies in Lee County. The search warrant authorized the search of premises of the defendant located in Monroe County, lying outside the limits of the Town of Nettleton, was directed to any lawful officer of Monroe County, and was returnable before the proper justice of the peace in that county. The point raised by appellant was that the mayor being a resident and elector of Lee County, although acting as ex officio justice of the peace and being *at the time within the limits of the municipality,* could not issue a search warrant to be executed in Monroe County beyond the limits of the municipality. The Court held:

> "When a town is located partly in two counties, the county line running through the municipality, the mayor is nevertheless the mayor of the entire town and in consequence is an ex-officio justice of the peace throughout the entire limits of the municipality, including that part in one county as well as the other; and being so, it follows that he is justice of the peace ex-officio of both counties—not having any foundation for his authority in Section 171 Constitution, but in Section 172 thereof—and being a justice of the peace of both counties, he has authority, *while acting within the municipality,* to issue a search warrant, under Section 1975, Code 1930, to be executed in any part of either one of the two counties."[22]

Query, whether under the authority of *McGowan v. State,*[23] *supra,* a later case than *Hathaway v. State,* a mayor has the power to issue a search warrant *while physically outside the limits of his municipality.*

In *Lancaster v. State,*[24] the Court in ruling defective a search warrant which stated (as did the affidavit therefor) that the affiant "suspects," etc. instead of the language of the statute "has reason to believe and does believe," etc., and further ruling that the fact that the owner of the premises searched neither consented nor objected to the search would not

[20] 196 So. 222 (Miss. 1940).
[21] 195 So. 323 (Miss. 1940).
[22] *Id.* at 324.
[23] 196 So. 222 (Miss. 1940), cited *supra* note 20.
[24] 195 So. 320 (Miss. 1940).

constitute a waiver, also decided that where an officer's search of premises was illegal because of defect in the affidavit and search warrant, a neighbor's testimony that she stood on her own premises and saw the officer make the search and discover evidence on the defendant's property adjoining was inadmissible on the same grounds as was the testimony of the officer.

H. Waiver Of Examination

In *De Angelo v. State*,[25] the defendant was convicted as an accessory before the fact to the crime of robbery. He was arrested on May 10th under a warrant issued by a justice of the peace, and on May 12th, which was only three days prior to the convening of the circuit court, he employed an attorney, and demanded a preliminary hearing. His request therefor was refused at the time for the reason that the State was not yet ready; but an agreement was reached whereby he was released under a $2000.00 appearance bond to await the action of the grand jury which was to convene on the following Monday. The bond was tendered and accepted on May 13th, before the grand jury convened on the 15th. The defendant moved to quash the indictment and filed a plea in abatement on the ground that he had been denied a preliminary hearing, and the charge against him was still pending in the justice of the peace court at the time the indictment was returned. Said the Court:

> "We are of the opinion that the giving of the bond by the appellant, to await the action of the grand jury, amounted to a discontinuance of the prosecution in the justice of the peace court, and a waiver of the appellant's right, under Section 1230, Code of 1930, to be taken before the officer for an examination of his case."[26]

I. Witnesses

Impeachment

The case of *Manning v. State*,[27] involved a conviction and appeal of and from a criminal offense, but the law contained in the case refers to impeachment of witnesses generally. The Court said:

> "Impeachment of a witness is accomplished in four modes, and in four only: (1) By cross-examination; (2) by proving his previous contradictory statements or acts; (3) by proof of his conviction of a criminal offense; and (4) by adducing general evidence tending to show that he is unworthy of belief on oath. and some authorities add a fifth: By physical demonstration or experiment properly conducted."[28]

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[25]192 So. 444 (Miss. 1939).
[26]*Id.* at 446.
[27]195 So. 319 (Miss. 1940).
[28]*Id.* at 320.

V.

EVIDENCE

*L. A. Wyatt**

A. Search and Seizure

On the subject of search and seizure the recent decision in *Goss v. State*[1] is interesting. This case announced a rule which has been followed in this State since the decision of the Mississippi Supreme Court in the case of *Mai v. State,*[2] rendered in 1928. In the *Goss* case the Court held that the issuance of a search warrant, which is regular on its face, by a justice of the peace, is a *conclusive* judicial determination that there existed probable cause for the issuance of such search warrant; and that in a criminal proceeding the accused was estopped to attack the validity of the search warrant and the consequent legality of the search and admissibility of evidence obtained thereunder on the grounds that the search warrant was issued without probable cause.[3]

Not only does the rule that the mere issuance by the proper officer of a search warrant regular upon its face is a *conclusive judicial determination*

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[1]192 So. 447 (Miss. 1939). The forerunner of this case is Mai v. State, 152 Miss. 225, 119 So. 177 (1928) wherein the Court made the following statement: "The issuance of a search warrant is a judicial finding by the officer issuing the warrant of the existence of the statutory grounds therefor set forth in the affidavit for the warrant. The issuance of the warrant is an adjudication by the officer issuing the same that probable cause exists for the search sought to be made. Hendricks v. State, 144 Miss. 87, 109 So. 263 [1926]; Loeb v. State, 133 Miss. 883, 98 So. 449 [1923]. It is true that in none of the cases did the court hold that the issuance of a search warrant was a *conclusive* judicial finding of the existence of probable cause therefor, but the reasoning in those cases leads to that result." This rule has since been followed in Creel v. State, 183 Miss. 158, 183 So. 510 (1938); Johnson v. City of Aberdeen, 179 Miss. 526, 176 So. 262 (1937); Casletlucio v. State, 168 Miss. 516, 146 So. 599 (1933); Sykes v. State, 157 Miss. 600, 128 So. 753 (1930).

It is to be noted that this rule applies only in the situation where there is a criminal prosecution by the State and not in the case of a civil action brought by an individual for the unlawful procurement or wrongful issuance of a search warrant. It would seem that the protection against criminal prosecutions based on evidence seized in violation of the vital constitutional rights pertaining to search and seizure would be a far more valuable judicial security of human rights, than the allowance to an individual of a civil action for damages as recompense for violation of those constitutional rights. It would be slight comfort to an individual sentenced to hang for a crime, the only proof of which was based on evidence indisputably obtained in violation of constitutional rights against unreasonable searches and seizures, to know, that although he was estopped to tell the court that the evidence upon which he was convicted was illegally and unconstitutionally obtained for the reason that there was not probable cause for the issuance of the search warrant, that nevertheless he would not be under such disability of estoppel if he brought a civil action for wrongful procurement or issuance of the search warrant, in which case the issue at stake would be monetary damages instead of life itself (and he might even be denied the civil action for the reason that it is often held that a person sentenced to capital punishment is civilly dead).

[2]152 Miss. 225, 119 So. 177 (1928).

[3]The first announcement of the rule is set out in note 1 *supra.*

of probable cause *not* appear in the law books, but the non-existence of such a rule is presupposed in the law books by discussion therein only of whether in attacking a search warrant on the grounds of lack of probable cause the question is one for the jury, or the court, or mixed.[4]

Mr. Cornelius in his work on searches and seizures has the following to say in commenting on such rule:

> "Conclusiveness of finding of probable cause on part of magistrate—where the magistrate finds probable cause to exist for the issuance of a warrant, and thereupon issues such warrant, may his findings of probable cause be reviewed by the court? It would seem wholly unnecessary to discuss this question in view of the overwhelming number of decisions reviewing, as a matter of course, the findings of the magistrate as to probable cause. Indeed the obvious purpose of the various state and federal statutes requiring that a search warrant can issue only upon a certain deposition or affidavit is to preserve the record for the purpose of review, and to hold the affiant liable to a charge of perjury if he has testified falsely. Nevertheless some inferior courts have held that the finding of the magistrate as to probable cause could not be reviewed. . . ."[5]

The footnote appended to the above statement reads as follows:

> "Author's note: This question would probably not be discussed were it not for the fact that a judge of a criminal court of record on one occasion (People v. Long, Recorders' Court of the City of Detroit, 1923), held that the appellate court had no authority to review a magistrate upon his findings of probable cause. . . ."[6]

The search of vehicles and automobiles may be made upon probable cause by an officer of the law without a search warrant,[7] but in such a case the Court very properly allows an accused to attack the validity of the search and seizure, and therefore the admissibility of evidence obtained thereunder, on the grounds of lack of probable cause.[8] It is said:

> "What is probable cause and the sufficiency of the evidence to constitute probable cause are judicial questions to be determined

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[4]56 C. J. 1223, §§ 126, 127; 24 R. C. L. 707, §9. In CORNELIUS, SEARCHES AND SEIZURES (2d ed. 1930) 372, §161, the following statement appears: "Upon a review in a higher court, there is no presumption that the search warrant was issued upon a showing of probable cause."

[5]CORNELIUS, SEARCHES AND SEIZURES (2d ed. 1930) 444, §178.

[6]Mr. Cornelius would no doubt be chagrined at the rule followed in Mississippi.

[7]MISS. CODE ANN (1930) §1976.

[8]Story v. City of Greenwood, 153 Miss. 755, 121 So. 481 (1929); Eady v. State, 153 Miss. 691, 121 So. 293 (1929); Hamilton v. State, 149 Miss. 251, 115 So. 427 (1928); Mapp v. State, 148 Miss. 739, 114 So. 825 (1928); Ingram v. State, 146 Miss. 303, 111 So. 362 (1927); McNutt v. State, 143 Miss. 347, 108 So. 721 (1926); see Comment (1930) 2 MISSISSIPPI LAW JOURNAL 349.

by the Court, and, if in fact the information obtained by the officer is insufficient to constitute probable cause, a search will be illegal, although the sheriff or constable might think it sufficient. They are not the final judges. The facts must amount to probable cause, and the court will pass judicially upon whether the information amounts to probable cause or not in each case coming before it."[9]

Why a justice of the peace who finds there is probable cause by issuing a search warrant is considered fully qualified to be the *sole* and *only* judge of whether there is probable cause, and his judgment thereon is considered so sound that it can never be questioned in a criminal prosecution based on evidence obtained under such warrant, and yet such soundness and conclusiveness of judgment is not attributed to sheriffs and constables where they decide that there exists probable cause for a search in those cases where the law provides for a search by a sheriff or constable of automobiles and vehicles without a warrant upon probable cause, does not appear.

The implications of the rule in the *Goss* case to the effect that the mere issuance of a search warrant regular on its face by a justice of the peace is a *conclusive* judicial determination that the constitutional requirement of probable cause has been satisfied, are serious. Undoubtedly, the constitutional element that search warrants shall not issue on suspicion alone, but only on good and sufficient probable cause, would seem even more important and fundamental that the two other elements requiring a special designation and sufficient description of the place to be searched and the thing to be seized. And to delegate to a justice of the peace the only and absolutely conclusive judicial determination of whether an individual has not been deprived of the fundamental constitutional guaranty that a search warrant will not issue except on probable cause, vests such justice of the peace with a plenary power and judicial authority which it is very doubtful that any one person, regardless of his degree of office, should possess. It would always seem unwise to permit any minor officer to be the final arbiter of the reasonableness of his own act. If a justice of the peace may ever be properly vested with the power to conclusively and finally determine an issue, surely such issue should not involve a vital constitutional right.[10]

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[9]McNutt v. State, 143 Miss. 347, 108 So. 721 (1926).

[10]Attention is called to the case of Wallace v. State, 157 N. E. 657, 660 (Ind. 1927), wherein the court, in discussing a statute substantially identical with Sec. 1975, Mississippi Code of 1930, which makes it the duty of the justice of the peace or other designated officer to issue a search warrant upon a proper affidavit, stated as follows: "If it was intended by this statute to declare that an allegation in the affidavit, such as therein prescribed, shall be sufficient to show probable cause, and that an affidavit embodying such allegation alone is proof sufficient to warrant the magistrate to determine the question of probable cause, *then in our opinion the Legislature, in that respect, exceeded its power, although it may make a certain act or series of acts prima facie evidence of a fact, yet it is not within its province to say to any judicial officer that, when he has heard proof of certain facts the evidence thus adduced before him shall constitute conclusive proof of the fact in issue in the trial of the cause before him.*" (Italics added.) If a legislative declaration to this effect would be unconstitutional, it would seem that a similar judicial declaration would likewise be unconstitutional, since the constitutionality thereof would not depend upon whether the judicial or legislative branch utters it.

The practical effects of the rule are indeed real. It no longer becomes a legitimate source of study and inquiry to consider what facts are necessary to constitute probable cause in any case where a search warrant regular on its face has been issued by the proper officer. Whether there be such facts or not, an individual may not avail himself of the issue. If the legality of a search under such a search warrant is to be contested, an individual is confined to proving illegality only on the failure to observe the two other constitutional requirements, *i.e.,* only on the ground that the place to be searched or thing to be seized was not specially designated; and this despite the fact that the Constitution also provides that the warrant may issue only on probable cause. In other words, while an individual may assert a *portion* of his constitutional rights and show the illegality of a search under such a warrant on some technical grounds as a failure to include a crib in which property seized is found as one of the buildings to be searched,[11] or an omission of the words "does believe" in the affidavit upon which the warrant is issued, although the affidavit does state "has reason to believe";[12] yet he may not be heard to say that he has been denied the fundamental constitutional right that no search warrant will issue except on probable cause, and that there was no probable cause for the issuance of a search warrant in the first place. Furthermore, we follow the rule that property seized under an illegal search or seizure, *i. e.,* in violation of constitutional protection against unreasonable search and seizure, cannot be introduced in evidence against the accused in a criminal prosecution, on the principle that to do so violates the constitutional protection against self-incrimination and unreasonable search and seizure.[13] This being true, to deny an accused in a criminal prosecution the right to prove the illegality of the search, and thereby prevent the introduction of evidence obtained under such search, on the grounds that the constitutional requirement that there must exist probable cause for the issuance of a search warrant has been violated, is to effectively impair the efficacy of the rule prohibiting admission of evidence obtained under an illegal search

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[11]See Stephens v. State, 183 Miss. 829, 184 So. 327 (1938); Deaton v. State, 137 Miss. 164, 102 So. 175 (1924); Falkner v. State, 134 Miss. 253, 98 So. 691 (1924); Taylor v. State, 134 Miss. 110, 98 So. 459 (1923).

[12]See Bouchillon v. State, 179 Miss. 791, 177 So. 34 (1937); Jones v. State, 180 Miss. 210, 177 So. 35 (1937); Morrison v. State, 140 Miss. 221, 105 So. 497 (1925); Porter v. State, 135 Miss. 789, 100 So. 377 (1924); State v. Watson, 133 Miss. 796, 98 So. 241 (1923); Turner v. State, 133 Miss. 738, 98 So. 240 (1923). In the Bouchillon case the affidavit upon which the search warrant was issued omitted the words that the affiant "has reason to believe and does believe," and the Court made the following statement: "If search warrants could be issued upon no better foundation than suspicion, Section 23 of our Constitution might as well have been omitted." To this could well be added: "and to absolutely deny any individual the right, which in itself would seem to be a constitutional one, to show that the warrant was issued on suspicion instead of probable cause (although the warrant and affidavit are regular on their face) is certainly a step toward omitting Section 23 from our Constitution."

[13]Cofer v. State, 152 Miss. 761, 118 So. 613 (1928); Owens v. State, 133 Miss. 753, 98 So. 233 (1923); State v. Patterson, 130 Miss. 680, 95 So. 96 (1923); Tucker v. State, 128 Miss. 211, 90 So. 845, 24 A.L.R. 1377 (1922).

and seizure. It would seem that the rule under discussion comes perilously close to a denial of due process of law.[14]

It should be a hope, as well as a prediction, that the rule announced in the *Goss* case will be changed. That this rule should go so long unnoticed and not have evoked some comment seems strange, especially in view of the fact that our position on the matter is almost completely destitute of author-

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[14]It is elementary that due process of law at the minimum requires the giving of notice and opportunity of a hearing. The effect of the rule under discussion is to altogether deny to the individual most vitally affected a hearing on the question of whether there was probable cause for the issuance of the warrant. Before the warrant is issued no notice is given to a person whose property is to be searched to appear and be heard on whether there exists probable cause for the issuance of the warrant; after the warrant is issued the Court holds that the mere fact of issuance thereof is a conclusive judicial determination on the point and that an individual cannot contest the legality of the search on the grounds that there was no probable cause for the issuance of the warrant.

And even if there were provided by statute a method whereby notice and hearing would be had in such instances (of course such would be entirely impractical), nevertheless it would seem that to even then deny an individual the right to appeal from the justice's of the peace ruling would be a denial of due process. In MOTT, DUE PROCESS OF LAW (1926) p. 236, it is said: "Closely connected with the subject of notice and hearing is the right of appeal. It has frequently been held that due process of law is not violated because the decision in the lower court was erroneous. One hearing is all that is necessary, provided that one be fair and impartial. It therefore follows that due process does not guarantee a right to appeal to a higher court. . . . There is however one significant exception to this power of the states in regulating their appellate systems. An appeal on the question of constitutionality of either procedure or result must always be permitted when fundamental rights are involved."

On the power of the legislature to establish by statute a *conclusive* presumption it is stated in 4 WIGMORE, EVIDENCE (3d ed. 1940) §1353: "Can the legislature prescribe a rule of conclusive evidence? To this question the answer can hardly be doubtful. It is one thing for the Judiciary, while exercising in its own way its constitutional powers, to choose to accept the aid of an official certificate in reaching its determination; but it is quite a different thing for the Judiciary to be forbidden altogether to exercise its power in a certain class of cases. The judicial function under the Constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of facts; to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. Hence, to make a rule of conclusive evidence, compulsory upon the Judiciary, is to attempt an infringement upon their exclusive province." However, just as the legislature lacks the power to impose a rule of conclusive evidence on the judiciary for the reason that such is a usurpation of judicial powers and violative of the constitutional principle of checks and balances, so, too, would the judiciary be limited by the constitutional principles of due process of law, unreasonable search and seizure, and self-incrimination, in its power to declare the findings of a minor judicial officer to be a conclusive judicial determination of such fact or facts, especially where there is no notice and hearing given to the person primarily affected thereby prior to such findings. See note 19 *supra*.

ity in and support from other jurisdictions in both text and decisions, and is likewise barren in reason.[15]

B. Parol Evidence

During the last session, more cases dealt with the parol evidence rule than with any other phase of the law of evidence. Particular attention should be paid to two cases[16] dealing with the admissibility of parol evidence in an action based on a written contract procured by an agent which contained a stipulation to the general effect that the written instrument embodied the whole and only contract and that the agent had no authority to vary or alter the terms thereof. In the case of *Berry v. McKay,*[17] the Court used the following language:

> "The rule applicable to this case is admirably stated in the case of White et al. v. Stewart, 166 Miss. 694, 145 So. 747, 749 [1933], wherein the Chief Justice of this Court said: 'The rule in this Court, in consonance with the weight of authority, is that a written contract, procured by an agent, to be afterwards approved by his principal, stipulating that it covers all agreements between the parties relative to the subject matter of the contract, in the absence of a statute to the contrary, excludes any agreement by the agent relative to the subject matter not embraced therein, withdraws from the agent the authority to make such, *and prevents his principal from being affected by the fraudulent making by the agent of an agreement not set forth in the contract, and not communicated to his principal. . . .* '"[18]

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[15]Apparently the only states following this rule are Missouri and Alabama, and exhaustive search has not been made to determine whether such rule is still in effect in these two states. In the case of State v. Shelton, 284 S.W. 433 (Mo. 1926), the Court stated: "The real purpose of the law is to require the prosecuting attorney to state the facts, as he did in this case, and when the justice of the peace, whose duty it is to pass upon probable cause, has acted judicially and determined that the warrant should issue, his judgment and order should not be controverted by oral testimony. If the justice should refuse to issue the warrant, the state would be bound thereby. The defendant should likewise be concluded by the judgment of the justice of the peace." And in the case of Toole v. State, 170 Ala. 41, 54 So. 195 (1910), the Court stated as follows: "The ascertainment of probable cause for the issue of the writ involved the exercise of the judicial function. Having acquired and exercised the jurisdiction in the premises by taking the affidavit of a person, and having issued the warrant substantially as required by the statute, the weight of the evidence to establish probable cause could not be made the subject of inquiry, nor could the judgment in that regard of the issuing magistrate be made the subject of review on the trial of the cause." Inquiry has not been made as to whether Missouri and Alabama follow the rule that evidence obtained under an illegal search and seizure is inadmissible in a criminal prosecution, but if such is the rule followed by those states, then at least there is no great inconsistency in not allowing an individual to prove the search and seizure illegal on the grounds of lack of probable cause, since evidence obtained thereunder would be admissible anyhow; but the logic of the court in both instances would bear close scrutiny.

[16]Berry v. McKay, 194 So. 299 (Miss. 1940); Grenada Auto Co. v. Waldrop, 195 So. 491 (Miss. 1940).

[17]194 So. 299, 300 (Miss. 1940).

[18]Italics supplied.

If the Court means that in such instances a principal would never be bound by fraudulent acts and conduct of the agent in the procurement of the contract, then such rule would seem to be a rather strict one; and it would seem that the Court should certainly allow evidence to be introduced which would establish fraud on the part of an agent, at least under certain circumstances.

In the case of *Grenada Auto Co. v. Waldrop*,[19] the defense to an action on a written contract for purchase of a refrigerator was that defendant had got a different type refrigerator than she had ordered from the agent. Defendant sought to introduce evidence to the effect that the refrigerator sent was not the kind she had told the agent she wanted, and that although the agent had shown her a catalogue, she had relied upon the statements of the agent. The contract contained these provisions: "This contract constitutes the entire agreement; no waivers or modifications shall be valid unless written upon or attached hereto" and "all promises, verbal understandings, or agreements of any kind pertaining to this purchase not specified herein are hereby expressly waived." The Court used the following language in holding for the plaintiff:

> "We are of opinion that the evidence, taken most strongly for appellees, was insufficient to show that either fraud or mutual mistake entered into and brought about the execution of the note and contract. Where parties enter into a written contract, their rights must be controlled thereby, *in the absence of fraud* or mutual mistake. All evidence of contemporaneous oral agreements and representations varying, modifying, or controlling the written agreement, is inadmissible. . . .
>
> "Negotiations and conversations leading up to a written contract are merged therein and evidence of such a conversation is inadmissible to contradict the contract. . . .
>
> "Appellees' reliance appears to have been principally upon the ground of fraud in the procurement of the contract. A party charging fraud must prove it by evidence which is clear and convincing. . . . The evidence in this case falls far short of that requirement."[20]

It is clear in the *Grenada Auto Co.* case that the Court allowed evidence to be introduced concerning the conversations and statements made which led up to the consummation of the written contract for the purpose of showing whether there had been fraud on the part on the agent in procuring the contract, and that the stipulation in the written contract did not cloak the principal with absolute immunity from the fraud of his agent in procuring a written contract wherein such stipulation appears. To this extent the language above used might be somewhat inconsistent with the

[19] 195 So. 491 (Miss. 1940).
[20] *Id.* at 492 (Miss. 1940).

language quoted from *Berry v. McKay* in so far as the admissibility of evidence tending to show fraud of an agent in such situations is concerned.

The injection of the parol evidence rule into the case of *Woodrich v. St. Catherine Gravel Co.*[21] makes that case a novel one in some respects. In that case the defendant had entered into a written contract to purchase sand and gravel from the plaintiff at a stipulated rate. Deliveries were made and full payment for all sand and gravel received was made by the defendant, but the defendant refused to pay the amount of the sales tax due on the total purchase price. The written contract was silent on the question of payment of sales tax, and in the action by the plaintiff to recover the amount of the sales tax due on the total purchase price, the defendant objected to the admission of any evidence tending to show an additional sum due on the written contract of purchase on the grounds that such admission would violate the parol evidence rule; and that to allow plaintiff to show a further sum due on the contract in the form of sales tax would in effect vary the price stipulated in the written contract. Of course, what the defendant was striking at was that since the contract failed to expressly provide for the payment of the sales tax, that such tax therefore should be absorbed by the plantiff. In passing on the point the Court said:

> ". . . the written contract shows on its face that the sales price was agreed upon by the parties, and if a sales tax is due under the controlling statutes, it was not a violation of the parol evidence rules to show what the real consideration was, for the prices agreed to by the parties or what elements entered into that consideration and the evidence thereon only conform to the contract and in no sense conflicts with or varies it."[22]

Strictly speaking, this action was one for an obligation imposed by law, *i. e.,* the payment of the sales tax due on a contract of purchase; and the right of the plaintiff to recover arose and was covered wholly by statute law. Since the Court always takes judicial notice of the statutes of this state,[23] it would seem that the parol evidence rule had no application to the case in the first place; and the Court in effect so held by adding:

> "We further say that under the controlling statute, Sec. 1, Chap. 155, Laws of 1936, which amends Sec. 2-c, Chap. 119, Laws 1934, it is mandatorily required that the seller shall collect the sales tax by adding to the sales price the two per cent sales tax thereon *in addition* to the sales price. . . . When the parties to this contract made it, they made it in contemplation of this Section of the law being enforced, and they knew or are now charged with

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[21]195 So. 307 (Miss. 1940).
[22]*Id.* at 309 (Miss. 1940).
[23]Miss. Code Ann. (1930) §§1597, 1598.

knowledge that the sales price would have added thereto the two per cent sales tax thereon, and that this sales tax should be in addition to the sales price agreed to by the parties. This statute, in this language, created, when the statute became effective, the relationship of debtor and creditor as to the sales tax. . . . Although the statute involved required the seller to pass this sales tax on to the buyer, and really constituted the seller a collector thereof for the State, there is no constitutional objection thereto."[24]

In the case of *Mixon v. Green*[25] the question was whether tung nuts were to be considered included under a chattel and crop deed of trust which described the property included thereunder as "all crops of cotton, corn, truck and other agricultural products, growing or to be grown by grantor and by anyone for him, or in which he may have any interest, and produced during the year 1938." The action was between the mortgagee and a third party, the plaintiff, who claimed the tung nuts as his own and sought to introduce evidence to show that he had given both oral and written notice to the mortgagee prior to the execution of the deed of trust that the tung nuts were not the property of the mortgagor. The defendant objected to this evidence on the grounds that under the clear terms of the deed of trust which covered "other agricultural products," the tung nuts were included therein, and that to admit such evidence would therefore vary and modify the terms of the written contract. The Court stated as follows:

"It is a matter of common knowledge, of which the court will take judicial notice, that generally 'agricultural products' in this State are understood to mean cotton, corn, potatoes, peas, hay, and other usual crops planted and harvested during the calendar year. We are of opinion therefore that the deed of trust is not so definite as to exclude parol evidence of what was meant by 'agricultural products.' In order to constitute an estoppel, the writing claimed to operate as such should be clear and unambiguous. . . .

"We conclude therefore there was no error in the admission of parol evidence that the understanding was that the deed of trust was not to cover the tung nuts."[26]

The Court's reasoning in this case seems to have been that the meaning of the term "other agricultural products" is one of which the Court will take judicial knowledge to the extent that the Court judicially knows that the term includes cotton, corn, potatoes, peas, hay, and other usual crops. If the particular product involved, however, is not one which the Court judicially knows to fall within the meaning of such term, then parol evidence may be introduced to show whether the parties intended that such

[24]195 So. 307, 309 (Miss. 1930).
[25]193 So. 8 (Miss. 1940).
[26]193 So. 8, 9 (Miss. 1940).

product should be included within the meaning of such term. It is not clear why the Court spoke of estoppel in reaching its decision.

In the case of *Cox v. Richardson*,[27] the Court held that parol evidence can never be introduced to reform a tax deed or to show that the sale was conducted in a manner other than that recited therein. In other words, no recitals in a tax deed of any kind, whether dealing with the manner in which the property was conveyed, the description of the property conveyed, date or time the sale was held, or who conducted the sale, may by parol evidence be shown to be otherwise than actually stated in the tax deed. And this is true although the undisputed facts are that some recital therein is erroneous or wrong, whether through mistake on the part of the seller or buyer. Any buyer acquiring land through a tax deed should be careful to see that the recitals in the tax deed conform to the actual facts to which such recital relates.

And in the case of *Belhaven Heights v. May*[28] one of the issues before the Court was whether there was an erroneous and defective assessment of city lots for the reason that the assessment roll failed to show whether the assessment pertained to a corrected plat of the subdivision in which the property was located or an original plat, vacated by court decree. The original plat had a marginal notation thereon directing one to the corrected plat, both of which plats were on file in the land records of the county. The Court held the description on the assessment roll was sufficiently definite, and when followed would in all events lead one to the proper plat correctly describing the property, and that parol evidence was admissible under Section 3151, Code of 1930, to apply the description on the assessment roll to the land itself.

C. Hearsay

Under hearsay, the case of *Williams Yellow Pine Co. v. Williams*[29] is an interesting decision dealing with the admissibility of business entries. In that case the plaintiff sued on a note, and the defense was that there had been a fraudulent concealment thereof and that the defendant corporation had not been apprised of the existence of the outstanding note. The plaintiff sought to introduce the books and records of the corporation for the purpose of showing that the note was listed on the bookkeeping records of the defendant corporation and that therefore defendant had knowledge thereof. Defendant objected to the admission in evidence of such records until the auditors who made them could testify as to their correctness. The Court stated as follows:

> "On this issue the proof disclosed that audits of the books of the corporation, made at the instance of its president, covering each of the two years immediately following the execution of the

[27] 192 So. 99 (Miss. 1939).
[28] 192 So. 7 (Miss. 1939).
[29] 193 So. 1 (Miss. 1940).

note, carried an item showing the note for $2,700 bearing date of July 16, 1925, as a liability in favor of the appellee; that the bookkeeper discussed these audits on different occasions with the president of the corporation in connection with its then outstanding liabilities, including the entry therein of the note in question; and that thereafter these audits were treated as part of the records of the corporation. They were objected to by the appellant on the ground that the auditors who made them were not introduced to testify as to their correctness. However, we are of the opinion that testimony as to their correctness was not required as a condition precedent to their admissibility in evidence on the issue as to whether or not the officers of the corporation were advised of this claim, contrary to its plea of fraudulent concealment."

The *Williams* case is also interesting on the point of admissibility of evidence given by a witness in a former trial involving the same issues and parties. The question involved, and the Court's ruling thereon, is clearly set out in the following language:

"It is urged, however, that one of the audits listed the note of $2,700 bearing date of July 16, 1925, as being a note carrying interest at seven per cent per annum, whereas the note sued on bears eight per cent per annum. This discrepancy was explained by the appellee on the ground that the auditor did not examine the note in her possession and ascertain its interest rate before making the incorrect entry on the audit from the books. The appellant thereupon sought to contradict her in that regard by offering the testimony of the auditor taken on the former trial wherein he had stated that he did call for and examine the note when he made the audit. The court ruled that the testimony of the auditor given on the former trial was not competent for that purpose. No reason was shown as to why the auditor was not introduced by the appellant on the second trial as witness, if his testimony was desired. Moreover, the proof discloses without dispute that the appellee held only one note of the appellant for that amount and of that date. Under the circumstances, we do not think it was error to exclude the testimony of a witness given on the former trial, when offered for the purpose of contradicting the appellee on the subsequent trial, without the absence of such witness being first accounted for."[30]

The rule above announced is in accord with the rule almost universally followed to the effect that before testimony taken at a former trial may be introduced, there must be a showing of why the witness himself is unavailable.[31]

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[30]193 So. 1, 2 (Miss. 1940).
[31]20 Am. Jur. 582, §689; 22 C. J. 431, §517.

In *Sandifer v. State*[32] the principal ground urged for reversal was the admission in evidence, over appellant's objection, of the statement made by him three or four hours before the homicide, that he was going to kill somebody. The Court held the evidence admissible, as tending to show that the killing was with malice aforethought.

Sullivan v. State[33] was a case dealing with the admissibility of a dying declaration wherein the deceased had accused another of killing him. The Court stated as follows:

> "The condition of the deceased from the time of receiving the wounds until the time of making the statement which was admitted in evidence, as held by the judge on the preliminary trial, with a view to determining the question of whether or not, at the time of making this last statement, the deceased had the settled conviction that death was then upon him. . . . The facts and circumstances developed by this evidence are such as would lead to the belief that the deceased had reached the settled conviction that he was going to die; and his conviction at the time of making the last statement, coupled with the testimony of others, showed that he believed death to be imminent, although he lived several days longer."[34]

D. Experts

On the subject of experts, it was held in the case of *J. W. Sanders Cotton Mill v. Moody*[35] that in an action for injuries sustained by a cotton mill employee when the clearer board of a spinner frame fell on the employee's foot, a chiropodist was a competent witness though some of his testimony was extravagant.

In the case of *Fortenberry v. Herrington*[36] the Court held that an attesting witness to a will may testify as to whether in his opinion the testator was competent to execute the will, and this although such attesting witness is not an expert on sanity. The Court stated as follows:

> "Nonexpert witnesses are permitted to give opinions in regard to mental capacity when they have stated the facts and circumstances, the acts and declarations of the testator, upon which they finally based the opinion expressed. . . .
>
> "Coexistent with the judicial history of this state has been the rule: 'The attesting witnesses must not only witness the signing and publishing of the will by the testator, but it is also their duty to satisfy themselves that he is of sound and disposing mind

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[32] 192 So. 342 (Miss. 1939).
[33] 191 So. 413 (Miss. 1939). See Comment (1939) 12 Mississippi Law Journal 253.
[34] 191 So. 413, 414 (Miss. 1939).
[35] 195 So. 683 (Miss. 1940).
[36] 196 So. 232 (Miss. 1940).

and memory, and capable of executing a will. . . . For this reason, in the case of Brock v. Luckett's Ex'rs, 4 How. 459, this Court said that the testimony of these subscribing witnesses is entitled to greater weight than the testimony of (witnesses) who had no such duty to perform, and especially is entitled to greater weight than the testimony of witnesses who were not present at the time of executing the will, and (especially is this true of those) who did not see the testator the day of its execution.'

"The attesting witness to a will may express an opinion as an expert upon the testamentary capacity of the testator."[37]

E. Miscellaneous

On the subject of judicial and common knowledge, it was held in the case of *Mississippi-Gulfport Compress & Warehouse, Inc. v. Public Service Comm*[38] that the Court would take judicial notice of the provisions of a charter of a corporation on file in the office of the Secretary of State. The Court stated: "However, there can be no doubt that the rule is that judicial notice can be taken of documents in the office of the Secretary of State as one of its departments from which judicial knowledge may be acquired." And in the case of *Yazoo & M.V.R.R. v. Board of Mississippi Levee Commissioners*[39] it was held that "it is common knowledge that portions of its railroad without the levees could not be operated at all during a part of each year because of overflow water from the Mississippi River." In the case of *Mixon v. Green,*[40] previously discussed herein, the Court held that "the Court will take judicial notice, that 'agricultural products' in this State are understood to mean cotton, corn, potatoes, peas, hay, and other usual crops planted and harvested during the calendar year."

The cases of *State Highway Comm. v. Dornbusch*[41] and *State Highway Comm. v. Johnston*[42] stand for the rule that an offer for property is not admissible as evidence of value in eminent domain proceedings. And in the case of *Mississippi State Highway Comm. v. Hillman,*[43] which was an eminent domain proceeding, the question arose as to whether the burden of proof that the defendant had suffered no damages in such case rested on the highway commission or on the landowner. The Court stated as follows:

"The party who has the burden of proof may be determined by considering which would succeed if no evidence was offered, and by examining what would be the effect of striking out of the

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[37] 196 So. 232, 236 (Miss. 1940).
[38] 196 So. 793 (Miss. 1940).
[39] 195 So. 704 (Miss. 1940).
[40] 193 So. 8 (Miss. 1940).
[41] 193 So. 783 (Miss. 1940).
[42] 191 So. 820 (Miss. 1939).
[43] 195 So. 679 (Miss. 1940).

record the allegations to be proved. The onus must be on the party who, under such test, would fail. The Highway Commission is the actor. It must make out its case before the landowner is called on to introduce evidence."

The case of *Kitchens v. State*[44] involved the question of whether the State had produced sufficient evidence to establish venue. The facts, and the Court's holding thereon, are set out in the decision:

"On the question of venue, the only proof offered by the State was that the appellant was drunk when he drove his automobile up to the home of the chief prosecuting witness, and that the witness lived 'about two miles below Starr, off of 49 Highway on the road known as the Stewart and Ella Ross road, in District No. 1 of Rankin County.'

"It may be conceded that there is only one Rankin County in the United States, and that by extended investigation into the proper sources of information we would be able to ascertain that there is no other county by that name outside of this country, yet we feel that it is more incumbent upon the State to make the necessary proof of venue by available witnesses than it is upon us to engage our time in going so far afield to supply the proof by resorting to judicial knowledge to be acquired from information that we do not now have."[45]

In the case of *Barry v. State*,[46] the accused was indicted on a charge of embezzlement, and objected to the introduction of evidence tending to show the embezzlement of different sums on different occasions. The Court held that for the purpose of showing motive and intent or disposition to commit the crime of embezzlement, more than one offense could be proven; but that the jury should be informed that they must agree on the particular items that constitute the crime.

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[44]191 So. 116 (Miss. 1939).
[45]*Id.* at 117 (Miss. 1939).
[46]192 So. 841 (Miss. 1940).

VI.

PLEADING, PRACTICE, AND PROCEDURE

*I. Semmes Luckett**

A. Pleading

(1) Law

It was held in *Hancock County v. State Highway Comm.*[1] that a plaintiff invoking a court's jurisdiction must show a right in himself to invoke the jurisdiction.

In *Hickman v. Switzer,*[2] a petition for judicial review of an election contest simply complained of the dismissal of the petitioner's protest by the executive committee; and the copy of the protest before the committee simply challenged the vote of one precinct without setting forth whether the effect of sustaining the challenge and discarding the vote would change the result arrived at by the executive committee. The Court held that the petition presented no cause of action, stating that a petition for judicial review of an election contest must show that if the matters complained of should be decided in complainant's favor, he and not the contestee would be the nominee for the office in question.

In *Mississippi Cooperative Ass'n. v. Walker,*[3] the Court restated the rule that partial payment or right of set-off must be affirmatively pleaded and that evidence tending to prove such defenses is not admissible under the general issue.

In *Brown v. Merchant's Co.,*[4] the Court gave effect to the rule that a judgment or decree on the merits in a former suit between the same parties and their privies upon the same cause of action by a court of competent jurisdiction is conclusive not only as respects all matters determined, but also as respects all matters which could have properly been pleaded and might or ought to have been litigated in the former action. In this case the defendant filed a plea of res adjudicata in which it set up a judgment in a former suit between the same parties, involving the same collision. The plaintiff sought to distinguish the second from the first by pointing out that in the second suit there had been added allegations to the effect that defendant's agent, who was driving its truck at the time of the accident, had departed from his customary routes and his master's business upon business of his own, as was his custom, and that this custom was well known to the master. The Court, being of the opinion that the added allegations could and should have been pleaded in the former suit, applied the rule mentioned above.

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*Member Mississippi and Coahoma County Bars; Clarksdale, Mississippi.
[1]193 So. 808 (Miss. 1940).
[2]186 Miss. 720, 191 So. 486 (1939).
[3]186 Miss. 870, 192 So. 303 (1939).
[4]186 Miss. 430, 191 So. 120 (1939).

During the past year the Court had before it for consideration the question of whether the statutes[5] requiring the filing with the declaration of a copy of any writing on which the action is founded apply in actions of replevin. In the two cases of *Winn v. Eatherly*[6] and *North v. Delta Chevrolet Co.*,[7] it was held that these statutes do not apply in replevin suits and that it is not necessary that writings on which the plaintiff's rights in such suits are based be filed with the declaration.

In *Roebke v. Love*[8] it was held that a written motion for a deficiency judgment is unnecessary where the motion is made orally, particularly where the prayer in the original bill for deficiency decree fully apprised the defendant of the purpose and desire of the complainant in the matter.

In *Burns v. Clarksdale Production Credit Ass'n.*,[9] the plaintiff filed no replication to defendant's notices of special matter under the general issue, his answer thereto consisting of a mere denial of the facts alleged therein. The Court held that no replication to these notices was necessary, since proof in avoidance of the matters set forth in the notices was not being relied on by the appellant as an affirmative defense thereto.

(2) Chancery

In the cases of *Malvezzi v. Gully*[10] and *Noe v. Gully*,[11] the Court held that an answer to a bill of complaint which begins its sentence with "defendant denies" and then recites the allegations of the bill, is a general traverse and therefore insufficient to put the complainant to proof of his allegations.

In *Dorsey v. Murphy*[12] it was stated that in inquiring into the accounts of guardians, the court is not controlled by strict technical rules, but should inquire into the matter and look after the interest of the minor even though that interest is not set forth with technical precision in the pleadings. The chancery court is under the duty to see that the interest of the minor is properly presented and has power to require any amendment or specific proceeding to be filed that it may deem necessary for the ascertainment of the truth.

The case of *Hutton v. Gwin*[13] involved the allowance of attorney's fees to an administrator, executor, or guardian. The Court held that, while the chancery court may properly make allowance for such fees, it can do so only on the request or petition of the administrator, executor, or guardian, and not on the direct petition of the attorney himself.

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[5] MISS. CODE ANN. (1930) §§526, 527.
[6] 192 So. 431 (Miss. 1939).
[7] 194 So. 478 (Miss. 1940).
[8] 186 Miss. 609, 191 So. 122 (1939).
[9] 195 So. 588 (Miss. 1940).
[10] 193 So. 42 (Miss. 1940).
[11] 193 So. 36 (Miss. 1940).
[12] 194 So. 603 (Miss. 1940).
[13] 195 So. 486 (Miss. 1940).

In *Reliance Investment Co. v. Johnson,*[14] a tax sale to the State and the elapse of the period of redemption had extinguished Johnson's rights in the land in question. In a suit by the patentee of the State to confirm his title to the land, Johnson attempted to set up that the procurement of the patent from the State had been fraudulent. The Court held that Johnson could not set up this defense, stating that when a person, although a party to a suit, has no actual interest to be affected by a question arising therein, that person will not be allowed to make or raise any point touching that particular question.

(3) Miscellaneous

In *Sperry's Estate v. Sperry*[15] it was held that a case reversed and remanded generally by the Supreme Court should be tried de novo in the trial court; and that on such trial additional pleadings may be interposed and additional evidence taken on the pleadings.

In *City of Meridian v. Peavy,*[16] the Court held that compensation for the taking of private property for public use cannot be recovered under a declaration against a city which simply charges negligence in the construction and maintenance of a culvert.

In *Sears Roebuck & Co. v. Van Dolah,*[17] the Court had occasion to consider the requirement of the federal statute that petition for removal be filed on or before the day the defendant is required by the law of the state or rule of the state court to plead to the declaration or complaint. It was stated that this limitation on the time within which the petition may be filed is not jurisdictional and that it may be waived, or the opposing party may be estopped by his conduct from objecting thereto. He will be considered estopped if he caused the record to disclose a nonremovable case at the time the defendant should plead, answer, or demur, but afterwards causes it to disclose one that is removable. Thus, a plaintiff will not be permitted to join a resident defendant against whom he has no case in a case against a nonresident and thus defeat defendant's right of removal.

B. Practice and Procedure

In *Roberts v. State,*[18] the defendant was apprehended in another state without any legal process and over his protest forcibly and unlawfully returned to this State for trial in the county where the crime was committed. In answer to the contention that the trial court was without jurisdiction of the person because of the manner in which accused had been apprehended, the Court aligned itself with what it considered the weight of authority in holding that the jurisdiction of the court in the county in which the crime

[14]194 So. 749 (Miss. 1940).
[15]196 So. 653 (Miss. 1940).
[16]194 So. 595 (Miss. 1940).
[17]194 So. 475 (Miss. 1940).
[18]186 Miss. 732, 191 So. 823 (1939).

was committed was in no way impaired by the manner in which the accused was brought before it.

In *Kitchens v. State,*[19] the defendant was convicted of driving an automobile while intoxicated. On the trial of his appeal to the circuit court of the county, the only proof of venue was that Kitchens was drunk when he drove his automobile up to the home of the chief prosecuting witness and that this witness lived "about two miles below Star, off of 49 Highway on the road known as the Stewart and Ella Ross road, in District No. 1 of Rankin County." To sustain the conviction of the circuit court it would have been necessary for the Court to take judicial knowledge that (1) Star was the "Town of Star"; (2) 49 Highway was "U. S. Highway No. 49"; and that (3) Rankin County, Mississippi, is the only Rankin County in the United States. This the Court refused to do.

The case of *Johnson v. State*[20] originated in the justice court for the first district of Humphreys County. From a conviction Johnson appealed to the circuit court of that county. In the trial in that court it was not proved that the offense occurred in the first district of the county. For that reason the circuit court's conviction was reversed.

Burkett v. Hagert[21] was an action by appellant to recover from appellees on a contract originally made by them with his assignor and two other persons. The bill affirmatively reflected that the appellant and the other two parties were jointly interested in the contract, not jointly and severally interested therein. The trial court entered no order on the special demurrer raising the question of non-joinder of necessary parties, but sustained a general demurrer to the bill on the ground that the contract sued on was void and unenforceable as being against public policy. This the Court held to be error. The general demurrer should not have been considered until all the real parties in interest were before the court, as until then there could be no full, adequate and complete relief granted.

In *State v. Bates,*[22] the defendant was indicted by the grand jury for carrying on a lottery. He moved to quash the indictment on the ground that he was compelled by the action of the court in issuing a subpoena *duces tecum* to produce books, papers, checks, etc. used in connection with his business. The Court held that a grand jury may not return an indictment based on books and papers obtained from accused by means of this writ and that the indictment in this case therefore conferred immunity upon Bates. The motion to quash was considered an appropriate remedy.

The Court had occasion to decide two questions involving receivers in *McRae v. Ashland Plantation Co.*[23] It held that a receiver cannot be ap-

[19]186 Miss. 443, 191 So. 116 (1939).
[20]186 Miss. 544, 191 So. 115 (1939).
[21]186 Miss. 621, 191 So. 411 (1939).
[22]192 So. 832 (Miss. 1940).
[23]192 So. 847 (Miss. 1940).

pointed prior to the actual filing of the bill therefor, and that a receiver appointed for the purpose of safely keeping books and records to await the further orders of the court should not, without authority of the court, permit an auditor for plaintiff to make audit of the books and records.

In *Cullens v. Cullens,*[24] the husband filed a bill for divorce on September 15, prior to the convening of the regular term of court on October 23. The defendant filed an appearance and waiver of service and process. but this appearance was not filed until October 25, after court had convened. The chancellor refused to grant the relief sought by the petitioner for the reason that he did not believe the defendant was legally in court. The Supreme Court reversed the decision of the chancellor and remanded the case for further proceedings, holding that Chapter 244 of the Laws of 1936 authorizes the appearance without plea and places such safeguards around such waiver of process and entry of appearance as will prevent, as far as any pleading would, collusion in the suit or fraud upon the courts.

In *Sumner Stores of Miss. v. Little,*[25] the plaintiff in his declaration alleged two slanders. The Court held that he should be required to elect upon which of the two he would rely and that such an election would not be considered an amendment to the declaration requiring an order from the court spread upon the minutes.

The case of *Gordon v. State*[26] gave the Court occasion to restate the rule that the trial judge is to use his discretion in deciding whether or not to grant a request for a view by the court and jury of the place in which the crime was committed; and that his refusal to grant such request is not assignable as error.

In *Shaw v. State*[27] it was held that in order to preserve the right of review for improper argument, it is necessary that the remarks be taken down by the court reporter and incorporated in a general bill of exceptions or shown by a special bill of exception taken in one of the ways authorized by law.

The Court, in *Avent v. Tucker,*[28] held that if the defendant does not invoke the comparative negligence statute through instructions of the trial court, the Supreme Court cannot on appeal consider the comparative negligence of the parties in determining whether or not the verdict was excessive.

In *Dixon v. State*[29] there was no motion for a new trial on the ground that the verdict of conviction was against the overwhelming weight of the

[24]193 So. 805 (Miss. 1940).
[25]192 So. 857 (Miss. 1940).
[26]196 So. 507 (Miss. 1940).
[27]195 So. 581 (Miss. 1940).
[28]194 So. 596 (Miss. 1940).
[29]196 So. 637 (Miss. 1940).

evidence. The Court, citing *Justice v. State,*[30] held that it therefore could not reverse on that ground where there was any substantial, reasonable, and competent testimony to go to the jury tending to establish the guilt of the accused beyond a reasonable doubt, and to the exclusion of every other reasonable hypothesis.

In *Illinois Central R. R. v. Paxton,*[31] the Court stated that a pleader is not required to prove those of his allegations which are surplusage. In a declaration against a carrier, it is sufficient to allege delivery of the goods to the carrier in a good condition and the delivery by it to the consignee in a damaged condition. The pleader's alleging that the damage was caused "by the negligence of the defendant railroad company and its connecting carriers in failing to transport said shipment with the proper degree of care and in handling said shipment in a rough and negligent manner" did not put him under duty of proving such negligence.

Shoemaker v. Federal Credit Co.[32] was a replevin action instituted by the credit company to recover possession of a truck sold to one Hurst, against which it held a purchase-money, retained-title contract. Appellants intervened and by affidavits set up their claims to a mechanic's and materialman's lien on the truck. The Court held this to be error, its reasoning being that a multiplicity of suits should be avoided if it can be reasonably done.

In *Hughes v. State*[33] it was held that a special term of court may be extended by order of the judge of the court beyond the duration of the term set forth in the original order.

In *Barry v. State,*[34] a prosecution for embezzlement, there was admitted evidence of numerous and different offenses. On appeal, the Supreme Court held that the prosecution should have been required to elect the particular offense it chose to pursue. Courts should not give instructions which permit a conviction without the concurring judgment of twelve persons about a particular offense. Jurors must not only agree that a defendant is guilty; they must agree on the offense of which he is guilty.

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[30]170 Miss. 96, 154 So. 265 (1934).
[31]193 So. 915 (Miss. 1940).
[32]191 So. 62 (Miss. 1939).
[33]195 So. 311 (Miss. 1940).
[34]192 So. 841 (Miss. 1940).

VII

PROPERTY

*James W. Bell, Jr.**
*John W. Dulaney**

A. Mortgages

In *Herron v. McLean*[1] it was held that a plaintiff had the burden of proving by a preponderance of evidence that the defendant had entered into an agreement to extend the maturity date of purchase money notes in order to enjoin the foreclosure for default in payment.

In *Eiland v. Castle*[2] the mortagor in a chattel mortgage brought a replevin suit against the trustee, alleging that the manner of advertisement and the place fixed were unauthorized by law. The Court refused to determine whether the sale would have been void if made, and held that the mortgagor could not regain possession of the property in a replevin action since the trustee had taken possession of it in a lawful manner for the purpose of foreclosure.

In *Hull v. Federal Land Bank of New Orleans*[3] a foreclosure sale by a second substituted trustee was upheld even though the appointment of the first substituted trustee was of record and outstanding at the time of the second appointment and the language of the second appointment was silent as to whether the succeeding trustee named therein was appointed in place of the original trustee or in place of the substituted trustee first appointed.

The case of *Home Owners Loan Corp. v. Wiggins*[4] was a suit to recover the balance due on a note after crediting thereon the amount realized upon foreclosure of a trust deed securing the note. The Court held: (1) That no defense was established by evidence that the fair cash market value of the mortgaged property equaled or exceeded the mortgage debt, there being no proof of fraud; (2) That mere inadequacy of sale price did not constitute fraud, unless the price was so low as to shock the conscience of the court; (3) That the sale was not made fraudulent by a finding that an agent of the mortgage holder was authorized to bid the entire amount of the debt if necessary, in the event of competitive bidding.

B. Fraudulent Conveyances

In *Holman v. Hudson*[5] a debtor in good faith made a conveyance to his daughter for a valuable, but substantially inadequate consideration.

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*Members Mississippi and Tunica County Bars; Tunica, Mississippi.
[1]191 So. 59 (Miss. 1940).
[2]186 Miss. 513, 191 So. 492 (1939).
[3]186 Miss. 593, 191 So. 118 (1939).
[4]195 So. 339 (Miss. 1940).
[5]193 So. 628 (Miss. 1940).

The Court held that the conveyance would in equity be held to be voluntary as to the grantor's creditors to the extent of the value of the property in excess of the consideration paid; but that since there was no actual fraud, the conveyance would be sustained to the extent of the consideration paid and given the effect of a mortgage to secure the same.

In *Lindeman's Estate v. Herbert*[6] the Court, following several earlier cases, held that a gift inter vivos to a donee who was an agent, relative, close personal associate and confidential adviser of the donor, would not be upheld except on clear and convincing proof of full knowledge and independent consent and action on the part of the donor. The gift in question showed certain corporate stocks which the donor endorsed in blank, but from which she received the dividends after the gift.

In the case of *Reed v. Lavecchia*[7], the following are listed as well-known badges of fraud: (1) Inadequacy of consideration; (2) Transaction not in usual course or mode of doing business; (3) Absolute conveyance as security; (4) Secrecy; (5) Insolvency of grantor; (6) Transfer of all property owned by grantor; (7) Attempts to give evidence of fairness by conscripting sister-in-law as conduit for passing title to grantor's wife; (8) Retention of possession; (9) Failure to make list of conveyed property which is commingled with other property; (10) Transfer to person having no apparent use for property; (11) Relationship of parties.

In two recent cases[8] the Court has held that the former owner of land could not raise a question of fraud in the procurement of a patent from the State following sale of land to the State, this being a defense that only the State could raise.

However, in *E. L. Bruce Co. v. Smallwood*[9] the Court said:

> "It is true, as contended by the appellant, that only the State is entitled to have the patent cancelled on the sole ground of the fraud committed upon its land commissioner in the procurement thereof, but this principle does not preclude the former owners of the land from having the patent cancelled in their own right as a cloud upon their title on the separate ground that the tax sale to the State is void as having been made on a date not authorized by law. This right of the owner is expressly recognized by Chapter 196 of the Laws of 1934, and existed long prior thereto. Nor are such former owners prevented from proving the fraud and the notice thereof furnished in the application of the patentee, or from emphasizing the grossly inadequate price paid to the State, as disclosed in the recorded patent, in answer to a subsequent vendee's contention that he is an innocent purchaser for value without notice."

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[6]193 So. 790 (Miss. 1940).
[7]193 So. 439 (Miss. 1940).
[8]Jones v. Russell, 194 So. 290 (Miss. 1940); Reliance Investment Co. v. Johnson, 193 So. 630 (Miss. 1940), *sugg. err. overr.*, 194 So. 749 (Miss. 1940).
[9]196 So. 227 (Miss. 1940).

C. Adverse Possession

Cox v. Richerson[10] involved primarily the question of whether certain land had been sold for taxes in the statutory manner. In finding that it had not, the Court also held that a tax deed could not be reformed and the purchaser must stand on it as written. The Court reaffirmed the holding in *Carter v. Moore*[11] that the three-year possession under a tax deed does not bar remaindermen during the life time of the life tenant, such remaindermen having three years after the death of the life tenant within which to bring suit to attack the validity of the tax sale. The Court further held that a purchaser at a tax sale, whose title has matured, can go into possession through an agent or tenant, and that the "occupancy" required under the ten-year statute of adverse possession is the same as the "actual occupation" required in the three-year statute relating to bringing suits to attack tax sales.

In *Lawrence v. Byrnes*[12] it was held that overlapping constructive possession of land does not aid either of two land owners against the other. In this case the period considered was the ten years preceding the filing of the suit, and the principle announced will doubtless at some time require further development. In the same case the Court held that a patent could not be affected by a subsequent corrected government survey.

The question was raised in *Baldwin v. Mississippi State Highway Department*[13] as to whether the Highway Department, having condemned land which had been purchased at a tax sale, could occupy the land and claim the benefit of the three-year statute of limitations. The Court held that the effect of the condemnation proceeding was the same as if the property had been conveyed by deed, and that the highway department could claim the benefit of the statute.

The Court held in *Jones v. Russell*[14] that the granting of an easement for a pipe line did not create the relationship of landlord and tenant between a gas company and the owner of the land so that the existence of the line and the fact that the employees of the company went on the land at once to keep the line in order would be considered possession of the grantor of the easement.

D. Trusts

In *Tanous v. White*,[15] White and another were, and for several years had been, tenants of a tract of land which they desired to purchase. Not having the necessary cash, they applied to Tanous, who paid the pur-

[10]186 Miss. 576, 191 So. 99 (1939).
[11]183 Miss. 112, 183 So. 512 (1938).
[12]193 So. 622 (Miss. 1940).
[13]193 So. 789 (Miss. 1940).
[14]194 So. 290 (Miss. 1940).
[15]186 Miss. 556, 191 So. 278 (1939)

chase money to the owner and took title in his own name. It was contended that appellees could not show by parol that the title was held in trust for them because of the provisions in the Statute of Frauds requiring contracts for the sale of lands and trusts in relation to lands to be in writing. The Court ruled against this contention, citing and quoting from a number of cases,[16] and held that since appellees were in possession of the land when the full purchase price was paid to the vendor, and no lien could, therefore, arise in his favor, the lien was in favor of the appellant, who had advanced the purchase money for appellees; and that the Statute of Frauds did not apply to cases of implied trusts so as to prohibit the showing by parol that a deed absolute on its face was in fact a mortgage.

Lewis v. Williams[17] should be studied with and closely compared with *Tanous v. White*. In this case there is involved an attempt to establish a constructive trust based upon an alleged oral promise to convey lands to the owner thereof prior to tax sale, title having matured in the State, upon payments to patentee of money paid out for the patent. It was held that the Statute of Frauds rendered such an oral promise void and that an oral agreement to reduce such promise to writing did not lift the promise out of the operation of the statute. It will be noted that both in this case and the Tanous case the party asserting the trust relied upon an oral arrangement. The element of possession which seems to have been the controlling element in the *Tanous* case is apparently lacking in the *Lewis* case and obviously is treated by the Court not as engrafting an exception upon the statute so much as removing the case from the operation of the statute.

E. Partition

In *Soloman v. Soloman*[18] a father and his son owned a house and lot, each owning one-half interest therein, the house being occupied by the son and his family. The father died and his half interest vested in the son and four other heirs. Subsequently the son died and his widow and children inherited from him a three-fifth interest in the property. The owners of the other two-fifth interest brought suit for sale for partition, which was resisted under a claim that the widow was entitled to occupy the house as her homestead, free of the right of partition in her cotenants. The Court, held, however, that it was only the three-fifths interest of her deceased husband which descended exempt from the payment of his debts and as to which the widow could assert her homestead rights; and that, therefore, the owners of the remaining interest in the property were entitled to a decree of sale for partition.

The decree of the Court in this case is somewhat analogous to the

[16]Jones v. McDougal, 32 Miss. 179 (1856); Fultz v. Patterson, 78 Miss. 128, 28 So. 829 (1900).
[17]186 Miss. 701, 191 So. 479 (1939).
[18]192 So. 10 (Miss. 1940).

rule in Mississippi that where two or more different states of title are created by one instrument, there can be no partition until the different holders of the title hold in the same degree; but that where the different states of title are created by different instruments, partition will be allowed.[19]

In *Wirtz v. Gordon*[20] the right of partition of the lands involved was denied by reason of the fact that the party asking partition did not have the necessary right of possession. The Court held that the constructive right of possession (the legal title to the mortgaged property) had been lost and that the right of possession passed to the trustee at the time of default. Actual possession had been lost through a foreclosure which was alleged to have been void. A distinction should be noted between this case and those cases which seem to hold that the creation of an estate for years, where actual possession vests in a tenant, does not defeat the right of partition.[21]

In *Delta Cotton Oil Co. v. Lovelace,*[22] the Court states as a rule that:

> "Where a tenant in common has, with the acquiescence of his co-tenant, made valuable improvements on the entire property so that the improvements made by him cannot be allotted solely to him, the other tenant who has made no improvements must pay to the improving tenant a sum equal to the proportionate amount of the enhancement, by the improvement, less a fair proportionate allowance against the improving tenant for use and occupation; and for the balance of the amount aforesaid a lien will be fastened upon the share of the non-improving tenant whenever he calls for a division of the property by which his undivided share shall be allotted to him. This is the rule of equity enforced everywhere in partition proceedings, and is founded upon the principle that he who would have the aid of equity must as a condition allow equity to be done to the opposite party."

F. Riparian Rights

In *State Game and Fish Comm. v. Fritz,*[23] the Court was evenly divided as to whether Miss. Laws 1932, c. 123 confers authority on the commission to remove gross non-game fish from lakes and streams. The opinions are important, however, because of the clear restatement of the common law in Mississippi as to the rights of a riparian owner and the

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[19]See Gwin v. Gwin 116 Miss. 619, 77 So. 530 (1917); Gwin v. Hutton, 100 Miss. 320, 56 So. 446 (1911).

[20]192 So. 29 (Miss. 1940).

[21]See Bowdre Bros. & Co. v. Sloan, 69 Miss. 369, 11 So. 631 (1891); Black v. Washington, 65 Miss. 60, 3 So. 140 (1877); Spight v. Waldron, 51 Miss. 356 (1875); Price v. Crone, 44 Miss. 571 (1870).

[22]196 So. 644 (Miss. 1940).

[23]193 So. 9 (Miss. 1940).

public with respect to the waters and bed of a lake and because of the extension of the common law of the State by the concurrence of a majority of the justices in holding that the right of commercial fishery belongs to the riparian owner and is coextensive with the boundaries of his soil under the bed of the lake. It was held that the riparian owner's rights are, however, subject to the rights of the public to ordinary fishing and the dominant right of the State for conservations.

The term "agricultural products" as used in a deed of trust in *Nixon v. Green*,[24] was held to mean crops planted and harvested during the calendar year and not to include tung oil nuts. A calendar year is frequently defined as the year from January 1st through December 31st, though it is sometimes considered to be any twelve months in succession. Perhaps the latter definition would be applied in considering the language of the Court since there has been a great increase in Mississippi in the planting of annual fall crops which mature in the spring or early summer.

In determining whether an instrument is a deed or testamentary in character, the controlling question as held in a long line of cases is whether any estate vested upon the execution of the instrument. This rule is reaffirmed in *Ates v. Ates*.[25] In the same case the Court held that a provision "that the grantee is to have a home on said land," was void for uncertainty.

Sylvester v. Stephens[26] held that a wife who voluntarily left her husband and refused to return to him could not complain of the husband's deed to their former homestead made without her signature.

Several eminent domain cases have been decided by the Court within the past year, largely cases involving the Highway Department.[27]

The well established rule that it is the difference between the value of the property before and after taking that is the only measure of damage was uniformly followed.[28] Otherwise the decisions treat mainly with the particular types of evidence offered in each particular case and their review would prove of no practical value.

G. Landlord and Tenant

In *Federal Land Bank of New Orleans v. Southern Credit Corp.*,[29] the main item of interest is the holding of the Court that the statutory lien

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[24]193 So. 8 (Miss. 1940).
[25]196 So. 243 (Miss. 1940).
[26]186 Miss. 504, 191 So. 483 (1939).
[27]State Highway Comm. v. Hillman, 195 So. 679 (Miss. 1940); Covington County v. State Highway Comm., 194 So. 743 (Miss. 1940); State Highway Comm. v. Dornbusch, 193 So. 783 (Miss. 1940); Baldwin v. State Highway Comm., 193 So. 789 (Miss. 1940); State Highway Comm. v. Smith, 192 Miss. 448 (Miss. 1940); State Highway Comm. v. Prewitt, 186 Miss. 778, 192 So. 11 (1939).
[28]See Roberds, *Work of the Mississippi Supreme Court—Property* (1938) 11 Mississippi Law Journal 55.
[29]192 So. 827 (Miss. 1940).

for rent in favor of the landlord may be shown to have been waived by a course of dealings between the parties.

In *Viator v. Moses*[30] the Court held that a tenant holding over the expiration of one year's lease with the consent of the lessor, became a tenant from year to year, and not from month to month, despite his failure to obtain a new lease contract or endorsement of extension on the old contract as provided for in the old contract.

The case of *Vaughon v. McCool*[31] involved land formerly owned by six tenants in common, which was purchased from the State under a forfeited tax land patent by McCool, the son of one of the co-tenants. McCool had made a share-crop on all of the lands under an arrangement with his mother, not ratified by the other co-tenants. No rent had been paid to the other co-tenants and the evidence showed that a fair rental exceeded the annual taxes. It was held that that agreement between the mother and son was not binding upon the remaining co-tenants and made the son a tenant at will of the remaining co-tenants, and thus disqualified him from acquiring their interest at the tax sale. Therefore his purchase of the State's title derived from the tax sale was a redemption for the benefit of all. The Court refused to draw a distinction between the relationship of landlord and tenant and the alleged relationship of a share-cropper insofar as the rights of the mother's co-tenants were concerned.

In *Clausell v. Riley,*[32] a tract of land belonging to tenants in common had been sold for taxes and the title had matured in the State. It was contended that the rule against acquiring title through tax sale by one tenant in common did not apply because their relationship ceased to exist after the State's title matured. The Court declined to accept this view.

H. Public Lands

In *Sharkey County v. Southern Credit Corp.*,[33] it was held that in order for a waiver of statutory lien for rent on 16th section school lands to be legal and binding, it is necessary for the board of supervisors to determine and set forth in detail the necessity for the waiver, the reasonableness of the waiver, and the extent to which the waiver shall apply; and not to leave the matter to the uncontrolled discretion of the county superintendent by blanket waiver of the county's right.

In *Covington County v. State Highway Comm.*,[34] the board of supervisors of Covington County claimed compensation from the State Highway Commission for a right of way through 16th section school lands. The Court held that the constitutional provision prohibiting the sale of

[30]186 Miss. 419, 191 So. 412 (1939).
[31]186 Miss. 549, 191 So. 286 (1939).
[32]196 So. 245 (Miss. 1940).
[33]186 Miss. 494, 191 So. 90 (1939).
[34]194 So. 743 (Miss. 1940).

such school lands did not prevent the letting out of highways through them; that the constitutional provision prohibiting the taking of private property without compensation did not prevent the imposition of an additional public use on property already set aside for a public purpose. In holding that the county could not recover, the Court followed the case of *Washington County v. Levee Comm.*,[35] in which recovery had been denied for school land condemned for levee purposes.

I. Mechanic's Liens

The question for decision in *Shoemake v. Federal Credit Co.*[36] was whether one holding a mechanic's lien on an automobile who had voluntarily surrendered possession thereof, could intervene in a replevin action between the finance company and the owner of the automobile. The holding hinged upon a construction of Section 3102 of the Code of 1930. The Court was equally divided, and as the lower court had adhered to a strict construction, that view prevailed. The net result is that under such circumstances, the holder of the mechanic's lien cannot intervene in such a suit, as he does not have a right of possession such as is necessary to institute a replevin suit on his own behalf, and as only those with such rights may have their rights adjudicated by intervention.

The Court held in *Hamilton Brothers v. Baxter*[37] that heating equipment which was easily detachable from the realty, and which could be removed without substantial impairment to the realty, would be subject to a mechanic's and materialman's lien, notwithstanding a prior trust deed against the realty. The Court found the facts sufficient to enable it to determine whether the particular fixtures in question were real estate fixtures or remained chattels. Attention was called to the fact that if the property was personal property, suit to enforce the lien was not limited to twelve months, but could be filed within the period of the general statute of limitations, so long as the property remained in the hands of the original lienor or of one deriving title or possession through him with notice.

J. Miscellaneous

Under the statute imposing a state sales tax of two per cent it is mandatory that the seller collect the tax by adding it to the sales price. In the case of *Woodrich v. Saint Catherine Gravel Co.*,[38] gravel was sold at an agreed price per ton, and it was held that the seller could recover from the buyer the agreed price plus two per cent to cover the tax.

It was held in *United States v. Mound Lake Plantation Co.*[39] that since a trustee in bankruptcy is not bound to pursue property the recovery

[35] 171 Miss. 80, 156 So. 872 (1934).
[36] 192 So. 561 (Miss. 1940).
[37] 195 So. 335 (Miss. 1940).
[38] 195 So. 307 (Miss. 1940).
[39] 195 So. 495 (Miss. 1940).

of which would involve expenses and difficult litigation, if the trustee fails to assert his claim to the property within a reasonable time, he will be deemed to have elected to abandon it.

VIII

PUBLIC LAW

*Sam V. Pack**

So many of the Court's decisions at its 1939-1940 terms could be classified, with more or less propriety, under the indefinite heading of public law that arbitrary limitation of the scope of this section is obviously necessary. Cases dealing with taxation, public lands, and public debt are excluded here to avoid duplication. The subjects of municipal or local government, elections, and statutes relative to one or the other are included.

A. Municipal Government

In *City of Ellisville v. State Highway Comm.*,[1] there arose this question: As between municipal authorities and the State Highway Commission, which has paramount jurisdiction with reference to rules and regulations governing the use of streets by travelers, particularly of the parking of cars on a street in a municipality where such street is a part of one of the primary highways of the State? The Court upheld the supremacy of the municipality, and dissolved the injunction granted to the Highway Commission whereby the city was restrained from removing an obstruction which the commission had placed on the graveled shoulder of a street to prevent automobiles from parking on the shoulder for the purpose of being serviced by a filling station. Applicable statutes, in the eyes of the Court, indicated no legislative intent to divest municipalities of police jurisdiction of any part of their streets, even though one or more of such streets had become a part of the state highway system. Such an intent must be clearly expressed before this ordinary police power of a municipality may be taken away and conferred upon some other authority.

American Oil Co. v. Marion County[2] was determinative of three propositions. First, a board of supervisors is without authority to lease real estate which is owned for county purposes, under Section 216, Code of 1930, providing that the board may "sell and convey" such lands. Second, an erroneous construction of a statute by a board of supervisors, though long and consistently followed by the board, has no effect whatever on the courts in their construction of the statute. Third, neither the negligence of a board of supervisors nor its affirmative acts can create an equitable estoppel against a county with reference to real estate owned for county purposes.

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*Member of Mississippi and Jones County Bars; Laurel, Mississippi.
[1]186 Miss. 473, 191 So. 274 (1939).
[2]192 So. 296 (Miss. 1939).

Section 6417, Code of 1930, provides that one-half of all ad valorem taxes received by a county for road purposes (excluding those for payment of road bonds) on property within a municipality which works its streets out of its own treasury shall be paid over by the county to the municipality. Under this section, the City of Biloxi had filed a claim for several thousand dollars with the Harrison County board of supervisors, and had given notice that a supplemental claim for additional money would be filed promptly upon the completion of a full audit then in progress. The county had not denied liability but was deferring payment, by agreement with the city, until the end of the year, by which time tax moneys with which to pay the claim would begin to come in and by which time, also, the city would be able to file its complete claim in detail. Before the end of the year, the State Tax Collector filed suit against the county on behalf of the city for a portion of the money due the city. The Court held that it was the primary obligation and duty of the city to collect the money from the county; that the State Tax Collector had no authority to intercept the orderly, reasonable and diligent efforts of the city during the progress of those efforts and thereby subject the city to the payment of the statutory twenty per cent fee to himself for doing what it was already in the process of doing; that where there are several agents who are allowed by law to sue on behalf of a political subdivision, the court is empowered to see that the agent who first sues acts in good faith; and that where he has not so acted, the court may authorize some other lawful agent to appear and take necessary steps for the protection of the interests of the subdivision.[3]

Mississippi Power & Light Co. v. Town of Batesville[4] dealt with the sufficiency of a notice of election under the Municipal Electric Plant Act of 1936. The Court held that posting of the town's election resolution was unnecessary where the resolution had been published in a newspaper which was published as well as circulated in the town; and that the resolution was not insufficient because it set forth that the purpose of the bonds was to "acquire" an electric plant without stating whether the method of acquisition would be by construction or by purchase. It was further held that the published notice of the validation proceedings need not show that the seal of the court was affixed.

In *City of Meridian v. Peavy*,[5] involving the liability of the city for damages to appellee's property as the result of the alleged negligent construction and maintenance of a culvert, the Court reaffirmed the principle set forth in *Chidsey v. City of Pascagoula*,[6] that a plaintiff proceeding against a city on pleadings and proof which present only the issue of a municipality's negligence cannot invoke, also as a basis for damages, the constitutional prohibition against the damaging of private property for public use except on due compensation first being made.[7] The case of

[3]City of Biloxi v. Gully, 193 So. 786 (Miss. 1940).
[4]193 So. 814 (Miss. 1940).
[5]194 So. 595 (Miss. 1940).
[6]102 Miss. 709, 59 So. 879 (1912).
[7]Miss. Const. §17.

Warren v. City of Tupelo[8] involved the city's liability for personal injuries sustained by a pedestrian who was hurt by the fall of a limb from a tree growing in the neutral ground between a public sidewalk and the curb of the street. The Court found that the evidence was insufficient to impute to the city constructive notice of the dangerous condition of the limb and upheld a peremptory instruction in its favor. Appellant's injury was a consequence of the tragic Tupelo cyclone which had damaged the tree some six weeks earlier.

In *Arkansas Fuel Oil Co. v. City of Oxford*[9] it was held that in a proceeding by a city to adopt a zoning ordinance under Sections 2474-2481, Code of 1930, as amended by Chapter 333, Laws of 1938, the publication of the zoning ordinance need not include a reproduction of the "use district" map, although such map was made a part of the comprehensive plan embodied in the proposed ordinance. The Court justified its holding on the ground of convenience. It held also that when the municipal council discovered that some unknown and unauthorized person had made a change in the map between the time of its original adoption and the council's final hearing, an order of correction and deletion was properly entered and did not require a new publication, because such correction did not amount to an amendment. It was simply the exercise of the board's inherent power to see that its records should continue to speak the truth.

The Court held in *City of Clarksdale v. Harris*[10] that mandamus is not the proper remedy for a claimant to payments out of the Disability and Relief Fund for firemen and policemen, provided by Chapter 55, Laws of 1930, where the board has acted adversely to claimant, for the familiar reason that the control of a board's discretion is outside the scope of mandamus.

B. Elections

Several decisions rendered by the Court further construe the Corrupt Practices Act. A clear exposition of several of its aspects may be found in *Harris v. Stewart*.[11] The Court held that in matters of procedure under the act, in respect to which the act itself is silent, the usual rules of procedure prevailing in other cases should apply. Thus, a contestant may take a nonsuit before trial on a pending petition and later file another petition. In the instant case, the contestee contended that the election was not void merely because the number of illegal votes which were cast exceeded the difference between the two candidates. He contended that the contestant must go further and plead and prove that the illegal votes were not cast for himself. Contestee admitted that under our law requiring secrecy in ballots a legal voter cannot be compelled to reveal in court how he voted,

[8]194 So. 293 (Miss. 1940).
[9]195 So. 316 (Miss. 1940).
[10]196 So. 647 (Miss. 1940).
[11]193 So. 339 (Miss. 1940).

but insisted that an illegal voter has no such privilege. The Court rejected contestee's reasoning. It noted that one who votes without being legally qualified commits a criminal offense. The rule against self-incrimination, if not the privilege of the secret ballot statute, would therefore effectually bar the obtaining of testimony from the illegal voter, and render the contestant powerless to prove that the illegal votes were cast against him. Aside from this practical consideration, however, the Court found that the act itself relieved a contestant of the burden of showing that the illegal votes were cast against him. It reasoned that Section 4 of the act necessarily implies that ballots shall be given only to qualified electors; that permitting unqualified electors to vote in such number as to exceed the difference between the candidates is manifestly a non-compliance with the act in a substantial and material particular; and that Section 5 states specifically what shall be done when there has been a material non-compliance with Section 4 or Section 5. The time within which the statutory petition of the contestant must be filed (the act says simply "forthwith") was also discussed. On this point it is interesting to compare *Turner v. Henry*.[12]

The *Harris* case reiterates the rule previously announced in *Pittman v. Forbes*, [13] that the contestant's petition for judicial review of the executive committee's order must bear the certificate of two practicing attorneys other than the attorneys who represent the contestant, or did represent him at the time they made their investigation of the facts and law. The act's requirement of a certificate of meritorious cause made by two attorneys after an "independent" investigation connotes that such investigation shall be utterly free of bias and prejudice, and a certificate by an attorney in the case, in the Court's opinion, is therefore insufficient. Furthermore, the certificate of two attorneys who meet this requirement of complete lack of bias or prejudice is jurisdictional, as important as the petition itself, and without it the circuit clerk may not institute proceedings to present the complaint to the special tribunal provided by the act nor may the tribunal nor the Supreme Court proceed thereon. *Pearson v. Jordan*.[14]

In *Hickman v. Switzer*,[15] a petition for judicial review of a contested election was found to be insufficient for the reason that it failed to show that contestant would have won the nomination if the executive committee had decided the matters complained of favorably to contestant. In *Shaw v. Burnham*[16] the Court stressed the requirement that a complaint of irregularities in a primary must be specific and not in merely general terms. In the last cited case it was pointed out that the contestee, as a matter of necessity, must have the right to file a cross-complaint before

[12] 193 So. 631 (Miss. 1940).
[13] 186 Miss. 783, 191 So. 490 (1939).
[14] 186 Miss. 789, 192 So. 39 (1939).
[15] 186 Miss. 720, 191 So. 486 (1939).
[16] 186 Miss. 647, 191 So. 484 (1939).

the executive committee, else the contestant would be able to restrict the review to grounds of his own choosing and preclude the contestee from showing that counter-balancing irregularities had been permitted in behalf of the contestant. The Court also held that under Section 6244, Code of 1930, providing the means by which an illiterate voter may be aided, it is mandatory that such voter shall have assistance, but that the part of the section which deals with the notation of the manager reciting such aid is directory only. Thus, the placing of the notation on the face of the ballot, instead of on the back, does not invalidate it.

In a proceeding under the Corrupt Practices Act, the successful candidate's qualifications for the office are not involved. *McKenzie v. Thompson.*[17] The special tribunal may only ascertain the will of the qualified electors who participated in the primary. Hence, if a nominee be not qualified for the office by reason of not being a qualified elector of the county, the only remedy is in the nature of a quo warranto proceeding after the general election.

The case of *Jones v. Election Comm'rs. of Hancock County*[18] did not deal with the act but with a county election under Section 4221, Code of 1930, which resulted in the abolition of the office of county prosecuting attorney. The Court held that there is no statutory provision whereby a qualified elector and taxpayer, without other interest in the outcome, may contest the result of such election.

C. Statutes

The Court was called on to construe a number of statutes relative to the administration of local government. In *Lacey v. State* ex rel. *Morgan,*[19] the Court found that, under Section 250, Constitution of 1890, the only qualification required of a public school trustee is that he be a qualified elector. The provision of Chapter 222, Laws of 1938, requiring trustees to be patrons of their school was therefore held to be unconstitutional.

The statute which gives the Board of Levee Commissioners the right to discharge its attorney "at any time" was interpreted to mean that he could be discharged only for cause and not at will. *Board of Miss. Levee Comm'rs. v. Kellner.*[20] This conclusion was reached notwithstanding the fact that the words "for cause" had been omitted from the present statute after having been contained in the first enactment. The Court did not believe that the omission of the words evidenced a legislative intent to confer upon the board the arbitrary power of removal at will in view of the definite tenure fixed by the statute and the persuasive precedent of *Ware v. State,*[21] wherein it was held that the power to remove "at any meeting" did not mean power to remove at will. Another question passed on by the

[17] 186 Miss. 524, 191 So. 487 (1939).
[18] 193 So. 3 (Miss. 1940).
[19] 192 So. 576 (Miss. 1940).
[20] 196 So. 779 (Miss. 1940).
[21] 111 Miss. 599, 71 So. 876 (1916).

Court in this case is of interest. The appellant commission urged that no recovery could be had by the ousted attorney, even though his removal might have been wrongful, for the reason that the attorney who succeeded him had been drawing each month all of the salary which the board was authorized to pay, and that the public funds could not be subjected to the burden of paying this salary twice. The Court held that the fact that the salary was paid to the second attorney did not defeat the right of the ousted attorney to recover. The Bar may regret that the Court did not cite and differentiate the case of *Bowlin v. Franklin County,*[22] dealing with payments made to a *de facto* officer.

In *Board of Levee Comm'rs. v. Parker,*[23] involving the manner in which the receiver of a liquidated bank should distribute certain funds, the levee board and the town of Itta Bena had entered into the stipulation that, if preferences should be allowed to the board and the town over other depositors, the aggregate amount so allowed should be apportioned between them *pro rata* in accordance with the unsecured balances due each. The Court said:

> "The trouble about this stipulation is that if the levee district is entitled to a preference over the town or vice versa, neither of them can release that preference in whole or in part in favor of the other, because of the prohibition found in Section 100, Constitution of 1890, and such a stipulation is not within the exception in that section permitting the compromise of doubtful claims, for such a doubt arises only upon unliquidated demands, or upon doubtful facts, not on what, for the want of a better term, may be denominated doubtful law."[24]

City of Belzoni v. State ex rel. *Rice*[25] reaffirms a principle of statutory construction followed in *State Tax Comm. v. Miss. Power Co.,*[26] and earlier cases, the opinion of the Court reciting:

> "Where the provisions of a statute are carried forward and embodied in a codification or revision, in the same words, or which are substantially the same and not different in meaning, the latter provisions will be considered as a continuance of the old law and not as a new or original enactment, and this is true both where there is an express declaration to that effect in the codification or revision and also in the absence of such declaration. This rule applies although the statute brought forward has been simultaneously repealed by the codification or revision. The effect of the continuance of the old law is that all rights and interests thereunder are preserved."[27]

Except as to enactments which express themselves to be retroactive

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[22]152 Miss. 534, 120 So. 453 (1928).
[23]193 So. 346 (Miss. 1940).
[24]*Id.* at 348.
[25]186 Miss. 623, 191 So. 657 (1939).
[26]172 Miss. 659, 160 So. 907 (1935).
[27]*Id.* at 666, 160 So. at 909.

and those which *ex vi termini* confine their operation to presently existing facts, all statutes are prospective and operate on the future; they apply to facts as and when the facts come into existence. Therefore, there is no substantial difference in the meaning of a statute which recites that it shall apply to counties "having" a population of thirty-two thousand persons, and one which recites that it shall apply to counties "having or which may hereafter attain" a population, etc.[28] The rule that the current federal census is the exclusive evidence of population of a state or governmental subdivision was reaffirmed.

The case of *Love Petroleum Co. v. Stone*[29] presented an odd situation. The Legislature in August, 1938, increased the sales tax on natural gas products for sale in this State from 2½ per cent to 10 per cent. The act, approved August 20, 1938, provided that the rate should be again reduced to 2½ per cent after March 1, 1939. Section 2 then provided that the act should take effect and be in force after September 1, 1939. On its face, therefore, the act was not to take effect until after it should have ceased to operate. The Court solved the anomaly by holding that "September 1, 1939" was obviously a clerical error and should have been September 1, 1938, and the act was enforced accordingly.

IX

TAXATION

*Joe H. Daniel**

A. General Property Tax

1. Exemptions

In the case of *Meador v. Mac-Smith Garment Co.*,[1] the Court had before it the problem of exemption from ad valorem taxes of certain property which had previously claimed and enjoyed a similar tax exemption. The factory had been built in 1929 and the exemption granted for five years, but the venture proved unsuccessful and the holdings of the company were foreclosed under a mortgage. The building was purchased by the organizer of a new corporation, but the difference in the work of the two firms necessitated the installation of completely new equipment and the removal of the old. The corporation filed its affidavit and petition, as provided for by statute,[2] and both were approved by the board of supervisors. The finding of the board was not appealed from. The Court held that by the statute, the Legislature had vested in the board of supervisors the jurisdiction and authority to determine judicially whether or not

[28]Hester v. Copiah County, 186 Miss. 716, 191 So. 496 (1939).
[29]186 Miss. 793, 191 So. 417 (1939).
*Member of Mississippi State Bar; Graduate student, University of Mississippi School of Law.
[1]191 So. 129 (Miss. 1939).
[2]Miss. Laws 2d Spec. Sess. 1936, c. 18.

the proposed factory was actually a new enterprise, or merely an old factory and enterprise operating under a new name. The statute is clear in its purpose, as shown by an amendment specifically covering such situations.[3]

In *Rush Hospital Benevolent Ass'n. v. Lauderdale County*,[4] the hospital corporation applied to the board of supervisors for exemption as a charitable institution.[5] The board denied the application, and an appeal was taken to the circuit court. It was shown that the hospital corporation was to be a non-profit organization, paying reasonable salaries to its officers and providing a sufficiently large charity ward, where patients were received free of charge or for a small compensation. There was no proof showing that the hospital did not comply fully with the law in assigning the rooms to charity patients, nor that the patients were not adequately treated, nor that the charges made were unreasonable. Although the jury had returned a verdict in favor of the county, the Supreme Court, basing its decision on two other cases[6] involving similar facts, held that the jury was in error in reaching a decision denying the application for the exemption.

2. Tax Assessments, Sales, and Patents

The only case involving assessments during the past year is that of *Belhaven Heights Co. v. May*,[7] which involved the sufficiency of the description on the tax rolls, when there had been a chancery proceeding to correct an erroneous map and the tax roll referred only to the map without specifying whether the old or new plat was intended. The Court held that at the time of the assessment only one survey existed, because the original survey had been replaced and a correct one substituted. The Court added that this was a sufficient description, since the statute[8] permits parol testimony where there is enough in the description to be applied to the lots in question by the aid of such testimony.

A number of cases involving tax sales have been decided in the past year. Among these is *Cox v. Richerson*,[9] wherein a deed given by the tax collector at a tax sale did not show on its face that the land was sold in the 40-acre blocks in conformity with the statutory requirement.[10] The problem was whether the deed could be reformed, or parol evidence

[3]Miss. Laws 2d Spec. Sess. 1936, c. 18, §1, provides: "In event of purchase of structure already built for new enterprises of public utility herafter enumerated, the executive officer or agent of said new enterprise shall make affidavit showing that said new enterprise is in fact a bona fide new enterprise."

[4]192 So. 829 (Miss. 1940).

[5]See Miss. Code Ann. (1930) §3108 (f).

[6]Hinds County v. Jackson Hospital Benevolent Ass'n., 180 Miss. 129, 177 So. 27 (1937); Warren County v. Vicksburg Hospital, 173 Miss. 805, 163 So. 382 (1935).

[7]192 So. 6 (Miss. 1939).

[8]Miss. Code Ann. (1930) §3151.

[9]186 Miss. 576, 191 So. 99 (1939); Comment (1939) 12 Mississippi Law Journal 258.

[10]Miss. Code Ann. (1930) §3249.

be given to show that the land was actually offered in such a manner as to conform with the statute. The tax deeds in question were given on 200 acres of land; and when the land was sold for taxes to the defendant, the deeds did not set out that the land had been sold so as to conform with Section 3249. The defendant sought to show by parol evidence that the land was actually offered in 40-acre blocks, so as to conform with the statute, but the Court held that the purchaser at a tax sale must stand upon his deed as written, and that his deed from the tax collector cannot be reformed, which would be the effect of admitting the evidence offered in this case. The Court added that the deed could not be corrected, even in a proceeding for reformation of the instrument.

In *Jones v. Russell,*[11] in which the property involved was sold on the last day on which the taxes could be paid, it was contended that the statute[12] applies only when there is an actual delinquency in the payment at the time the land is sold therefor. Since this property was sold on August 1, and since the plaintiff had until midnight of August 1 to pay the taxes, it was contended that there was not actually a delinquency. The Court held that a decision on this question would amount to a decision on the merits of the case—the very thing which the statute was intended to cut off; and that the only exception thereto which the statute recognizes is the actual payment of the taxes on the land prior to the sale therefor. Other problems of this case will be discussed at another point in this article.

In *E. L. Bruce Co. v. Smallwood,*[13] it was held that a sale to the State which took place on a date not permitted by statute[14] was void. The case also involved the problem of fraud in applications for land patents, and will be discussed at length presently.

The application and construction of the two-year statute of limitations[15] has merited considerable discussion by the Court during the past year. Among the cases dealing with this statute is *Jones v. Russell.*[16] The owner of certain property involved did not pay the taxes for 1931, and

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[11]194 So. 290 (Miss. 1940).

[12]Miss. Laws 1934, c. 196, providing: "The owner, mortgagee, or other person interested in any land which has been heretofore or may be hereafter sold or forfeited to the state for delinquent taxes may bring a suit or action to cancel the title of the state, or its patentees, or to recover said land from the state, or its patentees, on account of any defect, irregularity or illegality in the assessment, levy or sale of such land for delinquent taxes, within two years after the date this act becomes effective as to lands heretofore sold or forfeited to the state for delinquent taxes, and within two years after the period of redemption shall have expired, as to lands hereafter sold or forfeited to the state for delinquent taxes, and not thereafter. Provided, however, that limitations herein fixed shall not apply when the taxes on such land had been paid prior to the time it was sold for taxes, and provided further, that the provisions of this act shall not apply to lands sold to the state prior to January 1, 1928."

[13]196 So. 227 (Miss. 1940).

[14]Miss. Laws Spec. Sess. 1932, c. 383, §9.

[15]Miss. Laws 1934, c. 196, see note 17 *infra.*

[16]194 So. 290 (Miss. 1940), cited *supra* note 11.

the property was sold on August 1, 1932. On September 9, 1932, the owner granted to a gas corporation the right to install and maintain a pipe line over the land. The property passed subject to taxes and the easement of the gas corporation, to the plaintiff, who was a non-resident. The defense was that the two-year statute of limitations had run before the action was commenced. The plaintiff contended that the gas corporation was her tenant and that its possession inured to her benefit; and, therefore, under the ruling of *Russell Investment Corp. v. Russell,*[17] the statute of limitations did not apply. The Court held that the easement of the gas corporation did not create the relation of landlord and tenant and that the gas corporation's possession did not inure to the benefit of the plaintiff.

In *E. L. Bruce v. Smallwood,*[18] the plaintiffs made but a very limited use of the property. The Court held that the possession of the plaintiffs under the circumstances was sufficient, even though they did not actually reside on the land, in that they made some use of it. Since the possession of the plaintiffs was not disturbed, either by the State while asserting title under the tax sale or by the patentee or his vendees, until the defendant began cutting timber, the plaintiffs were not required to commence an action until within two years thereafter, under the rule of the *Russell* case.[19]

Cox v. Richerson[20] held that even if the sale is void as to remaindermen, a life tenant, under a duty to pay the taxes, is barred by the statute.[21] The remaindermen are not barred by Section 2288, providing for a three-year statute of limitations, because they are under no duty to pay the taxes while the life tenant is still living.[22] But Section 2288 bars the life tenant, unless suit is brought within the three years therein provided. Since the life tenant in this case did not pay the taxes and did not redeem during the three years, the purchaser under the void tax deed acquired the rights of the life tenant in the property thus sought to be conveyed and was entitled to the use and occupation of the land during the life of the life tenant.

In *Baldwin v. Mississippi State Highway Dep't.,*[23] the Court held that although the tax deed to the purchaser at the tax sale was void, there was vested in the defendant, by virtue of the condemnation proceedings to which the purchaser was a party, the purchaser's interest in the property; and such interest was sufficient, when coupled with three year's occupa-

[17]182 Miss. 385, 182 So. 102 (1938); on suggestion of error from 182 Miss. 385, 178 So. 815 (1938), in which the Court held that the statute had no application to a situation where the owner has continued in possession, either in person or by tenant. For a full discussion of this case see, Lowry, *Work of the Mississippi Supreme Court —Taxation* (1939) 12 Mississippi Law Journal 109; Wade, *Work of the Mississippi Supreme Court—Taxation* (1938) 11 Mississippi Law Journal 65.

[18]196 So. 227 (Miss. 1940), cited *supra* note 13.

[19]182 Miss. 385, 182 So. 102 (1938), cited *supra* note 17.

[20]186 Miss. 576, 191 So. 99 (1939), cited *supra* note 9.

[21]Miss. Code Ann. (1930) §2288.

[22]Comment (1939) 12 Mississippi Law Journal 258.

[23]196 So. 789 (Miss. 1940).

tion, to vest complete title in the defendant to the property, under the present statute.[24] Since the defendant took advantage of the rights which the purchaser acquired at the tax sale, the plaintiff was barred by the statute of limitations from asserting any claim to the property.

Moore v. Rotenberry[25] involved the construction of the statute[26] permitting redemption of land sold for taxes. The plaintiffs were minors at the time of the death of their father, and sought to redeem their undivided interests in land which was legally sold to the State on April 30, 1930, for delinquent taxes for 1929. The land in question had been sold for taxes prior to the death of their father, who had owned the land in fee simple, and was still in his possession at the time of his death. This suit was commenced in 1938, after the two-year period of redemption was up. The Court held that the saving clause of the statute applies only to land owned by an infant, or in which he has an interest, at the time of the sale. Here, they inherited no interest in the property as such, but only the right to redeem the land within two years from the date of the sale. And the saving clause of the redemption statute, giving to minors two years after reaching majority within which to bring their action, limits their rights to redeem their land to such property as they might, after the passage of the act, inherit or acquire by will.

A number of cases have been decided by the Supreme Court dealing with the problem of fraud in patents issued by the State to land which had been struck off to it for taxes. Among these is *Reliance Investment Co. v. Johnson,*[27] which was a proceeding to confirm a tax title under the statutory procedure.[28] The trial court held against the complainant on the ground that the procurement of the patent from the State of Mississippi was illegal and fraudulent and therefore void. The Supreme Court decided that the complainant's evidence disclosed a prima facie title in it to the land. The validity of the patent from the State could be challenged only under the statutory procedure in a proceeding instituted by the land commissioner for that purpose. On suggestion of error,[29] the former decision was upheld. The Court said that whatever rights the appellees had in the land in question were totally extinguished by the tax sale to the State and the elapse of the period of redemption. If fraud was perpetrated

[24]MISS. CODE ANN. (1930) §2288, providing that actual occupation for three years, after two years from the day of the sale of land held under a conveyance by a tax collector, shall give title.

[25]196 So. 758 (Miss. 1940).

[26]MISS. CODE ANN. (1930) §3264, providing, after stating the provisions of the limitation: "Saving to infants . . . whose land may be sold for taxes, the right to redeem the same within two years after attaining full age . . . from the state or any purchaser thereof." This section was amended by Miss. Laws 1932, c. 286 to provide: "Saving only to infants who have or may hereafter inherit or acquire land by will and . . . whose land may be sold for taxes, the right to redeem the same within two years after attaining full age."

[27]193 So. 630 (Miss. 1940).

[28]MISS. CODE ANN. (1930) §402.

[29]Reliance Investment Co. v. Johnson, 194 So. 749 (Miss. 1940).

against the State, that point can be raised only by the State. The defense of fraud is an affirmative one, and may be interposed only by a party whose title or interest is affected by the alleged fraud.[30]

State ex rel. *McCullen v. Tate*[31] involved a suit on the part of the attorney-general and the land commissioner to cancel a forfeited tax land patent issued to one of the defendants by a former land commissioner. There was evidence to show that in the sworn application, filed as required by statute,[32] the value of the land was grossly misrepresented. It had formerly been held that this application is a condition precedent to the right to obtain a patent, and when the application is considered as a whole, there must be a sufficient approximation to the substantial truth as not to amount to a palpable misrepresention.[33] The application of the present case had stated that the total value of the land was not in excess of $50, whereas the smallest estimate given on the trial by any witness was that the property was worth $200. The Court held that the land commissioner cannot validly sell the lands of the State at a grossly inadequate consideration, because such action would be in contravention of the Constitutional provision[34] prohibiting the donation, directly or indirectly, to individuals or to corporations of any lands belonging to or under the control of the State. The Court did not attempt to lay down a definite rule for determining inadequacy of consideration, but says that under the facts of this case, such a situation does exist.

In *E. L. Bruce Co. v. Smallwood*,[35] a patent was obtained in 1936 by the defendant's grantor, on an application setting out that the "present value of the land is not in excess of $80." The patentee then sold the timber rights to defendant for $700, and traded the land to another for 400 acres, paying less than $300 additional. No further taxes were paid by anyone until after the plaintiff filed this suit for cancellation of the patent as a cloud upon title. The Court held that only the State is entitled to have the patent cancelled on the sole ground of fraud, but that this does not preclude the former owner from having the patent cancelled when the tax sale is void. It is admitted that the tax sale of plaintiff's property was void, because made on the wrong date.

3. Taxpayer's Remedies

The Supreme Court, in *Yazoo & M. V. R. R. v. Conner*,[36] had again

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[30]In JONES v. RUSSELL, 194 So. 290 (Miss. 1940), cited *supra* note 11, the plaintiff asked, but was refused, permission to amend her complaint to allege that the patents were fraudulently obtained from the State; but the Court, citing the above case, held that only the land commissioner can raise the question of fraud on the State in obtaining land patents, and whether he shall raise the question is for his own determination.

[31]196 So. 755 (Miss. 1940).

[32]Miss. Laws 1936, c. 174.

[33]State *ex rel.* Land Comm'r. v. Adams, 185 Miss. 606, 188 So. 551 (1939).

[34]MISS. CONST. §95.

[35]196 So. 227 (Miss. 1940), cited *supra* note 13.

[36]194 So. 915 (Miss. 1940).

before it the problem of construction of the statutory procedure[37] for the collection of taxes which have been erroneously paid. In this case the plaintiff paid to the defendant a certain sum in taxes, which he claims to have been illegally levied and assessed. The defendant contended that the statute[38] providing for the presentation of a claim to the attorney-general to recover erroneously paid taxes is exclusive and that the plaintiff should have followed this procedure as a condition precedent to a right to maintain an action against the county under the other section.[39] A similar problem had been previously presented to the Court, in a former case,[40] and it was there held that it was not a condition precedent to the presentation of the claim to the board of supervisors that it first be presented to the Auditor of Public Accounts, and that actually the taxpayer has two remedies. According to a previous holding in *Schmittler v. Sunflower County*[41] it is necessary, however, in order to obtain relief from the board of supervisors under the procedure provided by statute,[42] that the tax payments be made under protest. Since the taxes sought to be recovered here were paid under protest, a direct suit could be maintained against the county for such refund, without first resorting to the remedy afforded by the statute, which required presentation of the claim to the Auditor of Public Accounts.

The Court here considered one other problem, dealing with whether the tax collector can be held liable for the taxes so paid in view of the statutes[43] requiring the tax collector to pay over to the proper authorities on the first day of the month his collections. The Court decided that a tax collector who has paid over the tax collection under such circumstances is not liable for the refund thereof to the taxpayer. The Court cited a previous case[44] which seemed to reach the opposite result, but distinguished it on the facts.

4. Miscellaneous

In *City of Biloxi v. Gully*[45] the state tax collector brought suit against Harrison County for taxes collected by the county for road purposes upon the property within the City of Biloxi, and allegedly due to the city. The county admitted its liability, but waited payment, pending a full and complete audit to supplement that which the city had already made. The state tax collector, knowing that there was a balance due to the city, made a hasty audit; the board hesitated to pay either claim, under the circumstances, and suit was brought by the tax collector. The city intervened,

[37] MISS. CODE ANN. (1930) §§253, 3276.
[38] MISS. CODE ANN. (1930) §3276.
[39] MISS. CODE ANN. (1930) §253.
[40] Illinois Cent. R. R. v. Attala County, 137 Miss. 408, 102 So. 266 (1924).
[41] 156 Miss. 277, 126 So. 39 (1930).
[42] MISS. CODE ANN. (1930) §253.
[43] MISS. CODE ANN. (1930) §§3289, 3292-97.
[44] City of Vicksburg v. Butler, 56 Miss. 72 (1878).
[45] 193 So. 786 (Miss. 1940).

and the lower court gave judgment for the tax collector, this judgment including a fee of twenty per cent. The city appealed, on the ground that the tax collector was not entitled to collect a fee since the city was already proceding toward the collection of the sum due to it and the county had admitted its liability. The Court held that the state tax collector cannot thus jump in and intercept the orderly, reasonable, and diligent efforts of the governmental subdivision during the progress of its efforts and thus impose upon the subdivision the payment of a twenty per cent fee for doing what the subdivision was already doing for itself.

In 1938, the Legislature passed a statute[46] providing that the board of supervisors may, in their discretion, levy a special tax of not over one mill on all taxable property, to raise money for treatment of indigent sick and for the promotion of the public health. The plaintiff, in *Yazoo & M. V. R. R. v. Bolivar County,*[47] had paid the tax under protest and brings an action to recover the sum so paid. The plaintiff contended that since the county had levied the maximum levy for all general county purposes, this tax was excessive. The Court held that this was not a general tax and did not come under the statute[48] specifying the amounts of the maximum levies; that it was a special tax, and not intended to be included in the general county taxes. Therefore, since the maximum levy applies only to general taxes, this tax did not make the levy excessive. The Court cites a recent case[49] in which the principles involved were practically the same and a like result reached.

Two cases[50] were decided during the past year dealing with the validation of county bonds, but it is felt that the cases are not of sufficient general importance to merit a discussion here, in that they consider mostly the compliance with statutory procedure in the issuance of county bonds.

B. Excise Taxes

1. Income Tax

One of the most interesting cases recently decided by the Supreme Court is that of *Mississippi State Tax Comm. v. Brown,*[51] involving the problem of state taxation of the income derived from shares of national bank stock. The taxpayer brought an action against the Tax Commission to annul an assessment on income from the stock, and the trial court decided in favor of the plaintiff. On appeal, the Court reached a three-three decision, thereby affirming the decision of the lower court.[52] The case considers two problems in detail: (1) Whether the statutes authorize the imposition of this tax, and (2) whether this action by the Tax Commis-

[46]Miss. Laws 1938, c. 315.
[47]186 Miss. 824, 191 So. 426 (1939).
[48]Miss. Laws 1932, c. 104, §4.
[49]Attala County v. Illinois Cent. R. R., 186 Miss. 294, 190 So. 241 (1939).
[50]*In re* Validation of Serial Funding Bonds of Clarke County, 193 So. 449 (Miss. 1940); *In re* Validation of Lincoln County Funding Bonds, 193 So. 26 (Miss. 1940)
[51]193 So. 794 (Miss. 1940).
[52]Robertson v. Miss. Valley Co., 120 Miss. 159, 81 So. 799 (1919).

sion amounts to taxation of a federal instrumentality, and is therefore void. As the basis for its decision that the State cannot legally tax, under its statutes,[53] the income from an instrumentality of the federal government, the Court cites many cases decided by the Supreme Court of the United States involving taxation, in one form or another, of such instrumentalities, in which the Supreme Court denied the power of the state to impose taxes thereon. This being true, in view of the old theory advanced by the Supreme Court of the United States—that the power to tax is the power to destroy—and that a tax on the income is a tax on the source from which it is derived—the Court felt that this tax would be an undue interference with the federal government.

Under an act[54] passed by Congress, the methods which states may use in taxing national banks are enumerated. The majority opinion of the Court concludes that since Mississippi is already taxing the banks in one of the methods permitted by Congress, this additional tax would amount to exercising a method of control over the banks. The opinion does not quote from nor seek to explain its decision under the statute, other than to say that the statute does not permit the State to levy an income tax upon the dividends from shares of stock in national banks, because the State has elected to tax the shares of national banks on their value to the owners of such shares, as provided in the first division of said act. The Court cites *Graves v. New York* ex rel. *O'Keefe,*[55] a recent United States Supreme Court case relied on by the dissenting opinion, but did not consider it controlling. The opinion also refused to discuss or decide the constitutionality of the federal statute, except to state that "we think we could not hold the act unconstitutional."[56]

The dissenting opinion discussed the provisions of the federal statute and concluded that the federal statute does not permit a state to tax the income derived from shares of national bank stock; however, it contends, the permission of Congress is not necessary to enable a state to include dividends from shares of stock in a national bank in the owner's taxable income. Until recently the Supreme Court of the United States followed the theory that a tax on the income is a tax on the source from which it is derived. However, in 1939, in the case of *Graves v. New York* ex rel. *O'Keefe,*[57] in which the State of New York sought to impose an income tax on the salary received by the employee of the Home Owner's Loan Corporation, the Court stated:

> "The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, . . . and the only possible basis for implying a constitutional immunity . . . is that the economic burden of the tax on

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[53]Miss. Laws 1934, c. 120.
[54]44 Stat. 223 (1926), 12 U. S. C. A. §548 (1934).
[55]306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927, 120 A.L.R. 1466 (1939).
[56]Mississippi State Tax Comm. v. Brown, 193 So. 794 (Miss. 1940).
[57]306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927, 120 A.L.R. 1466 (1939).

income was passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions."

Therefore the Court permitted the state to impose its non-discriminatory tax on the income of the federal employee. The theory thus advanced by the dissenting opinion in the Mississippi case is that this is not a tax on the federal government, nor on the national bank; it is measured by income which becomes the property of the taxpayer when received by him as income, and the tax laid upon the privilege of receiving it is paid from his private funds, and not from the funds of the government, either directly or indirectly.

The case appeared again before the Supreme Court on suggestion of error.[58] Again many cases were cited from the Supreme Court of the United States. The theory advanced is practically the same as that set out in the original opinion—that Congress has full power to protect the agencies it creates from state taxation.

It is the opinion of the writer that this case, due to its importance, is likely to come before the Supreme Court of the United States, for its decision. Further, in view of the change of the Court's attitude as indicated by recent cases[59] appearing to be more lenient toward state income taxation on federal governmental employees, it is felt that there is a strong possibility that the doctrine announced by the Mississippi Court may be either reversed or qualified.

2. Privilege and License Taxes

Another case involving the exemption of instrumentalities of or created by the federal government is that of *Roberts v. Federal Land Bank of New Orleans*.[60] In this case the bank brought an action against the sheriff to recover the amount of privilege taxes paid under protest on certain cars. The defendant contends that the tax was proper, under a Mississippi statute.[61] The act of Congress creating the Federal Land Bank provides that "Every Federal land bank . . . shall be exempt from Federal, State, municipal, and local taxation . . ." The Court held that the Federal land banks are agencies and instrumentalities of the United States Government, and therefore entitled to immunity from taxation. Congress has the power to create such a corporation and to protect the operations thus validly authorized.[62] Congress, having the power to pro-

[58]Mississippi State Tax Comm. v. Brown, 195 So. 465 (Miss. 1940).

[59]Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595, 120 A.L.R. 1466 (1939); New York *ex rel.* Cohn v. Graves, 300 U. S. 308, 57 S. Ct. 466, 81 L. ed. 666, 108 A.L.R. 721 (1937).

[60]196 So. 763 (Miss. 1940).

[61]Miss. Laws 1938, c. 148.

[62]Pittman v. Home Owners' Loan Corp., 308 U. S. 21, 60 S. Ct. 17, 84 L. ed. 16, 124 A.L.R. 1263 (1939).

tect an agency created by it, had the power to and did exempt the Federal Land Bank from taxation by the several states.[63] Therefore it is entitled to recover the taxes which it had paid under protest.

The case follows the rule of the United States Supreme Court, recognizing the Federal Land Banks to be governmental instrumentalities and thus not subject to taxation by the state.

A case involving a similar problem is that of *Compress of Union v. Stone,*[64] in which the compress sought to recover privilege taxes paid under protest. The plaintiff had compressed cotton for the Commodity Credit Corporation. The State Tax Commission claimed, under the statute,[65] a right to levy and collect a two per cent tax. The plaintiff contended that the tax was illegally levied and assessed, under the statute.[66] The Court held that it is only the income from sales to the government which is to be deducted. This was not a tax on a federal governmental agency, but a tax on income derived from such agency. Citing a recent case,[67] the Court said:[68]

> "An occupation tax measured by gross income is not invalid where imposed by a state upon a contractor with the United States as laying a direct burden on the Federal Government, even though the imposition of the tax may increase the cost to the government of the work contracted to be done."

In *Yazoo & M. V. R. R. v. Board of Mississippi Levee Comm.,*[69] the railroad company brought an action to recover back taxes paid under protest, which the defendant had levied and assessed under the Mississippi statute.[70] There were but two railroads in the district, and the other had very little mileage therein. The plaintiff paid the privilege tax under protest and seeks to recover such sum, on the ground that the tax levied was not really a privilege tax, but an "exaction of a fixed amount per mile of railroad, without relation to the granting of a privilege, and is arbitrary, and unreasonable, and unconstitutional, and void." The Court held that the State may select the occupations and professions to be taxed, the only requirements being (1) that all of the same class be taxed alike, and (2)

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[63]39 STAT. 380 (1916), 12 U.S.C.A. §931 (1934).

[64]193 So. 329 (Miss. 1940).

[65]Miss. Laws 1934, cc. 119, 222; Miss. Laws 1936, c. 158.

[66]Miss. Laws 1934, c. 119, §2-8, which provides: "... There shall be excepted from the gross income of the business . . . so much thereof as is derived from the sales to the United State Government . . . or from business which the State of Mississippi is prohibited from taxing under the Constitution of this state or the Constitution of the United States."

[67]James v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155, 114 A.L.R. 318 (1939).

[68]Compress of Union v. Stone, 193 So. 329, 330 (Miss. 1940).

[69]195 So. 704 (Miss. 1940).

[70]Miss. Laws 1932, c. 154, which provides for the Levee Commission to "levy and assess the following taxes upon the persons, property, and privileges, . . . to wit: . . . (b) an ad valorem tax of not exceeding ten mills on the assessed valuation of all property . . ., and (d) a tax on all privileges exercised within the district."

that the tax imposed be not so unnecessarily high as to deprive the persons taxed of the right to engage in a lawful occupation or business. The tax on the plaintiff meets the first requirement, because all other property "similarly situated" is taxed alike. The second is met, because, although the railroad pays a privilege tax greater in amount than that imposed on any other public utility, that alone does not invalidate the tax. Therefore, relief was denied. A dissenting opinion was based on the ground that the tax was unreasonable, discriminatory, and fell within the condemnation of the equal protection clause of the Federal Constitution.

Gully v. Mutual Life Co. of N. Y.[71] involved the taxation of annuity contracts and a construction of the Mississippi statute[72] providing for a minimum tax of two per cent on "gross premiums." The Court held that such contracts are within the contemplation of the statute taxing life insurance premiums, in that annuity contracts are conditions on the cessation or continuance of human life, and are therefore life insurance contracts. A dissenting opinion, citing the Code definition of life insurance,[73] said that "premium" means the consideration paid for a contract of insurance, and that annuity contracts are not within the meaning of the statute. It is shown that the contracts in question are for payments during life, and not at death, and therefore not within the above definition by the dissenting opinion.

In *Craig v. Ballard & Ballard Co.*,[74] the state tax collector sought to recover a tax under the trading stamp statute.[75] The Court distinguished engaging in the trading stamp business, and the mere incidental use of stamps as a means of stimulating trade. "Where a person or corporation is engaged in a distinct business, and as a feature thereof, in an activity merely incidental which serves no other person or business, the incidental and restricted activity is not to be considered as intended to be separately or additionally taxed."

3. Sales Tax

In *Woodrich v. St. Catherine Gravel Co.*,[76] the plaintiff brought an action against the defendant, who had been a contractor for the construction of a highway, to recover a balance due for gravel sold and delivered to the defendant. No provision for the payment of sales tax was included in the contract. The defendant contended on the trial that no sales tax was included or provided for, and that under the law no such tax

[71]196 So. 796 (Miss. 1940).
[72]Miss. Laws 1935, c. 20, §108.
[73]Miss. Code Ann. (1930) §5131, defining a contract of insurance as "an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the assured, upon the destruction, loss, or injury of something in which the assured or other party has an interest, as an indemnity therefor. . ."
[74]196 So. 238 (Miss. 1940).
[75]Miss. Laws Spec. Sess. 1935, c. 20, §221.
[76]195 Miss. 307 (Miss. 1940).

was due to the plaintiff, who had had to pay it. The Court held that the written contract showed that the sales price was agreed upon, and if a sales tax was due under the statute, it was not a violation of the parol evidence rule to show what the real consideration was—that the evidence only conforms to the contract, and in no way conflicts with or varies it. It will be noted that the statute, as amended,[77] required that the seller collect the sales tax by adding to the price two per cent in addition to the sales price. When the parties made their contract, "they made it in contemplation of this section being enforced." The statute created the relation of debtor-creditor as to the sales tax. The debt (for the tax) became fixed when the purchaser proceeded to pay the agreed sales price.

The defendant questioned again the constitutionality of making the seller a collector thereof for the State, but this was disposed of by citing a former case holding that such procedure was not unconstitutional.[78]

X

TORTS

*George H. Butler, Jr.**

The wide variety of tort cases decided during the past year has made it impossible to follow any strictly accurate scheme of classification, and subdivisions adopted herein have been adopted primarily with a view to convenience of treatment.

A. Negligence

In *Gordy v. Pan American Petroleum Corp.*,[1] plaintiff was injured by the explosion of a highly volatile fuel which she alleged had been sold to her for kerosene by mistake. The defendant retailer, who had made the sale to plaintiff's husband, previously had ordered a tankcar of kerosene from the defendant petroleum corporation. In the conduct of the retailer's business, petroleum products passed through several different tanks before being placed in the tank from which retail sales were made. Plaintiff sued on the theory: (1) that the petroleum company had negligently furnished the retailer this explosive as kerosene and the retailer had sold directly from this tankcar, without negligence on his part, or (2) that the petroleum corporation had properly shipped kerosene as ordered, but the retailer had negligently sold fuel from the wrong tank, or (3) that the petroleum company had negligently shipped the wrong fuel, and that the retailer had negligently failed to discover the error.

In the lower court both defendants were granted peremptory instructions and plaintiff appealed.

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[77]Miss. Laws 1936, c. 155, §1, amending Miss. Laws 1934, c. 119, §2-c.
[78]State *ex rel.* Attorney General v. Allen, 180 Miss. 659, 177 So. 763 (1938).
*Member of Mississippi and Hinds County Bars; Jackson, Mississippi.
[1]193 So. 29 (Miss. 1940).

One contention made by the petroleum company was that it had not manufactured the contents of the tankcar itself, but had purchased the car and contents from a reputable manufacturer. To this the Court replied that having sold a dangerous product as its own, the company, as in the case of the distribution of products intended for human consumption, was liable to the same extent as though it were the manufacturer.

The Court further held that under the evidence it was a question for the jury whether the petroleum corporation had delivered kerosene and the retailer had mixed the fuel through mistake in handling or whether the petroleum company had shipped the wrong product.

The peremptory instruction in favor of the retailer had been granted on the ground that he had purchased the petroleum from a reputable manufacturer, and had delivered this identical product to the customer. The Court stated that this was erroneous in view of the fact that the petroleum company might actually have furnished kerosene and been free from negligence, and the loss might have been caused solely by the retailer's negligence in handling.

The Court supported this reasoning on the ground that if the petroleum company had actually shipped explosive fuel in the kerosene tankcar, and the retailer had sold the identical product contained therein, there would have been numerous other injuries to purchasers, whereas there were none. Consequently, the reasonable inference was that the loss was caused solely by negligence of the retailer.

Further, the Court stated that possibly both parties might be liable if the jury should find that the company had shipped the wrong product, and the retailer had failed in his duty to discover the mistake. The case was reversed and remanded. The retrial of the case in the court below resulted in a verdict in favor of the petroleum company, and against the retailer.

In *Mississippi Public Service Co. v. Cunningham,*[2] plaintiff had contracted for the erection of a house, and the contractor performing the job left an uncapped gas pipe under the building. The defendant gas company installed its meter and connected its pipes to the house. Having later discovered the uncapped pipe, the defendant disconnected the gas supply. Subsequently, at the direction of the plaintiff's wife, a contractor who was installing heating appliances turned on the gas and an explosion ensued.

It was held that the defendant gas company was entitled to a directed

[2]195 So. 472 (Miss. 1940). In Miss. Power & Light Co. v. Goosby, 192 So. 453 (Miss. 1940), suit was brought against the power company, alleging that plaintiff's house was damaged by fire caused by defendant's wires. It was held a jury question under the evidence as to what caused the fire. Further, plaintiff was not held to have assumed the risk, in the absence of a showing that plaintiff had knowledge of the danger.

verdict. The gas company after cutting off the gas was entitled to rely on a city ordinance prohibiting persons other than the gas company from tampering with gas meters and connections. Further, the efficient proximate cause of the loss was the act of plaintiff's wife, and that of the heating contractor, which acts defendant was not bound to anticipate. A municipal ordinance which required inspection and testing of gas systems was held not applicable, since defendant had not finally put the system into service, as contemplated by the statute.

One of the most unusual recent cases is *Carey-Reed Construction Co. v. Farmer.*[3] The defendant construction company was building a highway. Water was essential in the conduct of the work and defendant received permission from the City of Cleveland to use its water supply. Defendant attached a pipe to a Cleveland fire plug and drew its water from this source. As the work progressed southward from Cleveland, the city pressure was not strong enough to meet the defendant's requirements. To secure water from a nearer source, defendant inserted one end of pipe into a bayou, which had been polluted by sewage. The other end of the pipe was still connected to the Cleveland water system at the fireplug. At the bayou end of the pipe a force pump was used to force the water northward to the site of construction work. There was evidence that on one occasion this pump operated all night at a pressure greatly in excess of that maintained at the Cleveland water system.

The next day complaint was made of the city water. Upon learning of the connection, the city commissioner disconnected the defendant's line. Numerous persons in the area surrounding the fireplug became ill. Plaintiff, a resident of this area, brought suit, and recovered judgment.

On appeal it was held that the evidence supported a finding that appellant had negligently polluted the water supply. In answer to the defendant's contention that there was no substantial evidence of negligence but only inference upon inference, the Court reaffirmed the holding in *Masonite Corp. v. Hill,*[4] to the effect that there was no rule prohibiting the basing of one inference upon another, the restrictive rule being confined exclusively to cases of legal presumptions.

In *Meridian Amusement Concession Co. v. Robertson,*[5] plaintiff sued for the death of a child who was drowned while swimming in a pool operated by defendant. The negligence charged was inattention of lifeguards employed by defendant. The evidence was conflicting, but tended to show that the child went from the children's pool to a deeper pool, in full view of the lifeguards, who made no attempt to ascertain whether the child could swim. In addition there was evidence that certain of the life-

[3]192 So. 48 (Miss. 1940).
[4]170 Miss. 158, 154 So. 295 (1934); Comment (1935) 7 MISSISSIPPI LAW JOURNAL 323, reprinted in (1935) 1 CURRENT LEGAL THOUGHT 71.
[5]193 So. 335 (Miss. 1940).

guards were devoting the major portion of their attention to young ladies in bathing suits.

In reply to defendant's contention that it was entitled to a directed verdict, the Court held that it was a question for the jury as to whether the child lost its life through the negligence of the lifeguards, and, further, that the indication from the evidence was that the exercise of reasonable care in looking after the child would have prevented the drowning.

In *Yazoo & M. V. R. R. v. Fields*,[6] plaintiff brought suit, alleging that the defendant railroad had negligently set fire to grass between its main line and a spur track, and that the fire had crossed the spur track and destroyed plaintiff's gin. The defendant urged that a foreman employed by plaintiff saw that the fire had not been properly extinguished by the defendant's employees, and could have completely extinguished the fire himself and thereby have avoided damage to the plaintiff's property; and that as a consequence the plaintiff was not entitled to recover.

The Court distinguished between the rule applicable where an injured party fails to avoid further damage so far as he reasonably can after an injury has in part been inflicted, and the rule which applies where the injured party fails to take reasonable care to avoid a threatened injury, no part of which has yet happened. The former relates to the duty to diminish damages, whereas the second is contributory negligence, and at common law related to the question of the existence of a cause of action and had no application to the matter of damages.[7]

In the present case, no injury had occurred at the time the plaintiff's foreman failed to avoid the threatened injury, and consequently his conduct amounted only to contributory negligence, which by statute in Mississippi, does not affect the existence of the cause of action but operates only in diminution of damages.

B. Master and Servant

(1) Master's Liability for Injuries to Servant.

The development of master-servant law in Mississippi has been characterized by a gradual restriction of the rules immunizing the master from liability. The increasing limitation of exempting doctrines has resulted in substantial enlargement of the master's liability. Considerations of policy have required that the person for whose benefit an enterprise is conducted should compensate those who are injured while acting in his behalf. It is equally necessary, however, that the duties imposed upon the master shall not be so onerous as to interfere with the practical operation of the business. Consequently, when the acts or conditions causing the injury are related to or connected with fault on the part of the master, liability is gen-

[6]195 So. 489 (Miss. 1940).
[7]4Restatement, Torts (1939) 918, Comment a.

erally imposed. Where, however, the hazard is inherent in the nature of the work, or attributable to fault of the employee or his fellow-workers, the master's immunity has been upheld.[8]

In *Wade-Stevens Lumber Co. v. Addy,*[9] the plaintiff-employee operated a planer near a cut-off saw in defendant's lumber plant. The saw struck one of the board ends which had accumulated nearby, and hurled it against plaintiff, inflicting injury. Defendant contended that it was part of plaintiff's duties to remove the accumulations and that his injury had occurred as a result of his own fault. Defendant appealed from a verdict for the plaintiff.

It was held that the case was properly submitted to the jury on the issue whether it was plaintiff's duty to remove the accumulations himself. If the removal was to be done by another employee, who had failed to do so, the master had failed in his duty to provide a reasonably safe place to work.[10]

Plaintiff had been granted an instruction to the effect that unless plaintiff was guilty of negligence in the matter of the removal of the accumulations, he was entitled to recover. The Court rejected the contention that this was tantamount to a peremptory instruction in favor of the plaintiff, stating that it properly submitted the issue of whose duty it was to make the removal.

In *Fromme v. Borcham,*[11] an employer who had directed an employee to hang a curtain, without directing the use of a stool from which the servant thereafter fell while hanging the curtain, was held not liable on the ground of failure to furnish a reasonably safe place to work. The stool was not defective or insubstantial; and the plaintiff herself had chosen to use it in the performance of the task.

Wherever the nature of the work engaged in is such that the formulation of rules and regulations or the institution of a system would operate to minimize hazards of the work, the master is under a duty to inaugurate and administer such a set of rules for the conduct of the work.[12]. Thus in *Neely v. Young,*[13] the Court affirmed a judgment in favor of plaintiff, who sued for the death of an employee killed during the construction of a highway project. The suit was brought on the theory that the employer had been negligent in failing to provide a safe system for carrying on the work. Deceased was the driver of a "speed-ace", and under the system in

[8]Note (1939) 12 MISSISSIPPI LAW JOURNAL 243.
[9]194 So. 303 (Miss. 1940).
[10]Cf. Finkbine Lbr. Co. v. Cunningham, 101 Miss. 292, 57 So. 916 (1911); Note (1940) 12 MISSISSIPPI LAW JOURNAL 459.
[11]193 So. 811 (Miss. 1940).
[12]Note (1939) 12 MISSISSIPPI LAW JOURNAL 243, 248; Malone, *Work of The Mississippi Supreme Court—Torts and Negligence* (1938) 11 MISSISSIPPI LAW JOURNAL 76, 84.
[13]186 Miss. 879, 192 So. 292 (1939).

use was required to drive down a steep embankment to unload dirt. The safe method of doing this work would have been to deposit the dirt on the side of the road, later to be pushed over the embankment by another machine. The Court stated that there was sufficient proof to warrant a finding that the system in use was highly dangerous, and that a safer method, equally effective, could have been provided.

In *Virginia-Carolina Chemical Co. v. Jefferson,*[14] the Court reaffirmed its former pronouncement that where the servants have adopted a safe method of their own for the doing of work, but are ordered by a foreman to change it in interests of haste, and the changed method is unsafe, the master is liable for injuries occasioned.

In *J. W. Sanders Cotton Mill, Inc. v. Moody,*[15] the Court pointed out the distinction between the duty of the master to furnish reasonably safe instrumentalities, and the duty to furnish a reasonably safe place to work.[16] It was held error to give an instruction which in effect placed the liability of the master on the theory of furnishing an unsafe place to work, where the primary issue involved only a particular unit of an instrumentality.[17]

It is a general rule that an employee who injuries himself by overexertion, exposure and the like cannot hold the master liable, as he himself is the best judge of his own capacities and strength. The Mississippi Court has in terms adopted this rule, but has further decided that where the servant is compelled to perform the acts under coercion, the master must respond in damages. Thus in *Meridian Laundry Co. v. James,*[18] plaintiff brought suit for personal injuries alleged to have been sustained in doing work required of her by the defendant laundry company. Plaintiff contended that as a consequence of being required to work in violation of Section 4653, Mississippi Code of 1930, governing the working hours of women, she became so physically weakened that she was unable to perform her duties, and so sustained injury in attempting to do so. The evidence disclosed that the heaviest task required of plaintiff was the lifting of twelve pound packages of linen. In reversing and dismissing the case, the Court stated that the character of the work was such that any normal person could have performed it, and that the defendant's foreman was therefore justified in telling the plaintiff either to do the work or quit. The violation, if any, of the statute relating to working hours was held to have no causal connection with the injury in view of the fact that plaintiff's work was more piece work than hour work, and she often had considerable intervals of leisure during the day.

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[14]186 Miss. 861, 192 So. 306 (1939).

[15]195 So. 683 (Miss. 1940).

[16]Comment (1935) 8 MISSISSIPPI LAW JOURNAL 219.

[17]See Sanders Cotton Mill, Inc. v. Moody, 195 So. 683 (Miss. 1940), where the Court said: "The place of work is the location, the situs, the premises, and if an injury occurs there by force of an independent defect in a machine which is being used at the place, the wrong must be laid upon and proved against the machine, and is not to be ascribed to the more general conception of a safe place to work."

[18]195 So. 689 (Miss. 1940). See also Goss v. Kurn, 193 So. 783 (Miss. 1940).

(2) Master's Liability for Torts of the Servant.

In *White Lumber Co. v. Collins,*[19] plaintiff alleged that he had been assaulted by the resident manager and the general manager of the defendant corporation while they were attempting to compel him to give security for a delinquent account he owed the corporation. Defendant contended that the alleged assault took place on Sunday; that the statute[20] prohibits employment on Sunday, and that as a consequence the managers could not have been acting in the scope of their employment.

The Court stated that because of the nature of the duties of the office of managers and their general supervisory powers, the master would be liable for torts committed in furtherance of the business, even if committed on Sunday. It was stated that a sufficient test of a master's liability for a servant's tort is whether the tort was committed under the master's actual or potential supervision, not whether the master could have legally authorized the commission of the tort, either as to time or manner.[21]

The question of imposition of liability upon an employer for a tort committed by an employee is nearly always a difficult one to decide. Principles and policies belonging to the different fields of torts and agency must be considered and their proper application determined. The basis for the imposition of vicarious liability upon the master is founded largely on the social policy of putting the burden of an enterprise upon him for whose real or fancied benefit the project is being carried out. Considered from this viewpoint, it seems that the fact that the tort was committed on Sunday should not, of itself, operate to relieve the master of liability.

In *Tarver v. J. W. Sanders Cotton Mill, Inc.,*[22] plaintiff allegedly had been assaulted by defendant's nightwatchman. The assault took place outside the enclosure within which the watchman's duties were to be performed. In affirming the propriety of a peremptory instruction in favor of the defendant, the Court discussed the matter from the standpoint of "apparent authority" of the employee. The use of this terminology in this type of case seems rather unusual. "Apparent authority" is important primarily in contract cases; and it is a pertinent inquiry in tort cases only where there has been some reliance upon the appearance of agency, and the injury is attributable to such reliance.[23] Perhaps the phrase was carelessly used for that other phrase "scope of authority."

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[19]186 Miss. 659, 191 So. 105 (1939), *sugg. err. overr.,* 193 So. 212 (1940).

[20]Miss. Code Ann. (1930) §1131.

[21]Justices McGehee and McGowen dissented. Although a majority of the Court agreed that the peremptory instruction for the corporation was properly refused, the case was reversed as to it because two of the judges believed that the peremptory instruction should have been given, and three judges, including one of those in favor of the directed verdict, believed the entire case should be reversed because the verdict was against the weight of the evidence. Thus there were four judges in favor of reversal of the judgment against the corporation.

[22]192 So. 17 (Miss. 1939).

[23]2 Restatement, Agency (1933) §265.

C. Motor Vehicles

In *Roy v. Hammett Motors Co.*,[24] it was held that an automobile dealer who delivered a car to the sons of a prospective purchaser for demonstration purposes, was not liable for injuries to plaintiff caused by the negligence of one of the sons. The Court rejected plaintiff's contention that since the dealer was using the sons as intermediaries in the hope that they would induce their father to make the purchase, the sons were acting in the interest of the dealer.

In *Gooch v. Dillard*,[25] suit was brought against an owner for injuries received because of the negligence of an alleged employee in driving an automobile while intoxicated. It was sought to charge the defendant with knowledge that the driver was likely to be drunk while driving. The Court held that information that the driver occasionally drank liquor, but not while at work, was insufficient to charge defendant with knowledge that the employee was likely to be drunk while driving.

In *Coca Cola Bottling Works of Greenwood v. Hand*,[26] plaintiff sued for injuries caused while attempting to avoid a collision with a truck entering the highway from a side road. There was evidence that the plaintiff was traveling at an excessive speed and that he could have seen the approaching truck for a considerable distance before he reached the intersection. The Court held that under the evidence the plaintiff's fault was the sole proximate cause of the injury. It added that drivers traveling on favored thoroughfares having the right of way are not entitled to cross ahead of vehicles approaching from other roads, unless they both reach the intersection at approximately the same time.

In *Avent v. Tucker*,[27] deceased was killed in an intersection collision while he was driving north on a through highway and defendants were driving east on a cross road. There was evidence that the defendants failed to use proper care upon entering the crossing, and also that the deceased himself was extremely negligent. The Court held that the case was properly submitted to the jury on the issue whether the defendants were so negligent in approaching the intersection as to render them liable on the theory of concurrent negligence.

The Court further held that since the defendants, husband and wife, were driving the wife's car for the purpose of getting their mail in town, the parties were engaged in a joint enterprise in respect to liability to third persons. In addition, since defendants had failed to invoke the comparative negligence statute at the trial, deceased's admitted negligence could not be considered in determining whether the verdict was excessive.[28]

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[24]192 So. 570 (Miss. 1940).
[25]193 So. 619 (Miss. 1940).
[26]186 Miss. 893, 191 So. 674 (1939).
[27]194 So. 596 (Miss. 1940).
[28]Note (1938) 11 Mississippi Law Journal, 221.

In *Furr v. Brookhaven Creamery Co.*,[29] deceased was killed while attempting to board a moving truck. The Court affirmed the granting of a peremptory instruction in favor of the defendant company. It stated that in order to show negligence on the part of the driver, it would have to be shown that he saw deceased; was aware of deceased's intention to board the truck; and increased the speed of the truck, and could have foreseen that an increase in speed might result in injury to deceased. The plaintiff's evidence was held insufficient to support a finding that the driver was aware of the deceased's perilous situation.

In *Myers v. Sanders*,[30] suit was brought against a contractor for the death of a passenger in a truck being driven over a highway which was under construction. The negligence charged against the defendant was in obstructing the highway by piling sand on the edge of the traveled portion of the road. The Court held that since the highway was incompleted, the contractor was only required to keep it in a reasonably safe condition for those exercising vigilant caution and a constant lookout while traveling thereon. The Court stated that the sole proximate cause of the accident was the failure of the driver of the truck to anticipate the possibility of his vision being obscured by dust on this highway and his failure to maintain a constant lookout with the consequent lack of control over the vehicle.

In *Tri-State Transit Co. v. Moore*,[31] plaintiff alleged that he was standing eight or nine feet off the edge of the highway when defendant's bus suddenly swerved and struck him. In reply to defendant's contention that the verdict was without support of believable evidence, the Court stated that the allegation above, standing alone, would severely strain the Court's credulity; but that since it was further shown that a cow was in the vicinity, possibly the bus might have swerved to avoid the animal. In addition, the Court stated that stories containing unusual or surprising assertions may sometimes carry within themselves considerable evidence of their verity; for if fabricated in their entirety, the fabrication would have been better done.

D. Railroads

In *Illinois Central R. R. v. Roberson*,[32] plaintiff brought suit for injuries sustained in a crossing collision. The crossing involved was located in a deep curve in such a position that the engine headlights could not follow the curve, and consequently an engineer could not see vehicles at the crossing until so close that, at the rate the train was traveling, it was impossible to stop in time to avoid the collision. It was shown that the trainmen had given the required statutory signals, but that the plaintiff

[29]192 So. 838 (Miss. 1940).
[30]194 So. 300 (Miss. 1940).
[31]190 So. 231 (Miss. 1939).
[32]186 Miss. 507, 191 So. 494 (1939).

himself had not complied with the statute requiring him to stop, look and listen.

In rendering judgment for the defendant, the Court stated that outside of municipalities, ordinarily there was no restriction on the speed of railroads when approaching crossings; that to require railroads to reduce their speed at all grade crossings would, to a large extent, defeat the purposes of modern transportation. Consequently, the operation of the train in the manner set forth was held to involve no negligence on the part of the train crew, whereas the plaintiff was guilty of negligence which might have caused the collision.

Two cases, *Gulf M. & N. R. R. v. Addkison,*[33] and *Summerford v. Illinois Central R. R.,*[34] dealt with the liability of a railroad for collisions with cars obstructing crossings. In accordance with former decisions of the Court,[35] recovery was denied in both. The Court declared that occupancy of an entire crossing by railroad cars for a sufficient period of time to allow persons to see them, is ample warning within itself that the crossing is obstructed; and nothing further is required.

In *Southern Ry. v. Busie,*[36] plaintiff was a trespasser on a train of defendant railroad and was ordered by an unidentified person to leave the train. Plaintiff was injured while attempting to jump from the moving train. In view of numerous contradictions, inconsistencies and improbabilities in plaintiff's evidence, the Court reversed the judgment for plaintiff and rendered a decision for the defendant. One judge dissented on the ground that the Court should hesitate to usurp the function of the jury; and that a verdict should never be reversed on the theory that one party was entitled to a peremptory instruction, where there was some evidence to support the jury's finding, even though it appeared to be against the weight of the evidence.[37]

E. Carriers

(1) Injuries to Passengers

In *Teche Lines, Inc. v. Shelton,*[38] plaintiff was a passenger on defendant's bus and sustained injuries in an accident which occurred when the driver's vision was obscured by spray from water over the highway. The evidence showed without conflict that the driver had asked the driver of another bus and an employee at a bus station, whether there was water over the highway at this point and had been informed that there was not. It was held that no negligence could be charged against the driver, but

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[33]194 So. 593 (Miss. 1940).
[34]196 So. 264 (Miss. 1940).
[35]Spilman v. Gulf & S. I. R. R., 173 Miss. 725, 163 So. 445 (1935); Gulf M. & N. R. R. v. Holifield, 152 Miss. 674, 120 So. 750 (1928).
[36]193 So. 918 (Miss. 1940).
[37]See Note (1940) 12 Mississippi Law Journal 350.
[38]193 So. 618 (Miss. 1940).

that on the contrary he had exercised a high degree of care, and under the circumstances was guilty of no negligence in regard to the speed at which he was driving.

A contrasting situation arose in *Teche Line, Inc. v. Keyes,*[39] where it was held that a bus company was liable for injuries to a passenger sustained in an accident which resulted when the bus struck a boggy defect in the highway. The driver was making his first trip over this particular route and had not been informed of the defect although the route had been followed for over a year, and during that time a former driver had learned of the danger and taken precautions to avoid it. The Court stated that a common carrier by motor bus owes the duty to its passengers to exercise the highest degree of care and precaution for their safety that is consistent with the practical conduct of its business. Further, that in the discharge of this duty, the bus company should at least require reports from its drivers of dangerous conditions existing in the highways, and furnish other drivers with the information so obtained.

The liability of a carrier to a passenger for an assault committed by an employee is discussed in *Yazoo & M. V. R. R. v. Smith.*[40] Plaintiff was standing on the steps of the coach in search of a child who was missing from the coach, and was ordered to get off by the train porter. When plaintiff failed to move, he was kicked from the train. The Court announced that a carrier is liable to a passenger for an assault made upon him by any employee whose ordinary duties are such as to bring him into contact with the passenger, whether the employee was acting within the scope of his employment or not; further, the fact that plaintiff undertakes but fails to prove that the employee was so acting, is immaterial.

(2) Carriers of Freight

At common law the liability of a carrier of freight was that of an insurer; except for losses occasioned by acts of God or the public enemy or the inherent nature of the goods without negligence on the part of the carrier.

In the case of *Illinois Central R. R. v. Paxton,*[41] plaintiff sought to recover for damage to a carload of tomatoes which were damaged in shipment. Defendant contended that the loss resulted from certain defects present in tomatoes at the time of shipment. The Court held that where the carrier's defense is that the loss resulted from the inherent nature of the goods, the burden is on the carrier to prove that fact, and that there was no contributing negligence on its part, unless such facts appear from the evidence of the shipper himself. It was held that the carrier had failed to meet this requirement.

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[39]193 So. 620 (Miss. 1940).
[40]196 So. 230 (Miss. 1940).
[41]193 So. 915 (Miss. 1940).

Plaintiff had alleged and attempted to prove negligence on the part of the carrier. The Court affirmed the doctrine that even though a shipper is unable to establish negligence he may proceed on the basis of the absolute nature of the carrier's liability, and an unsuccessful attempt to prove more than required of him will not defeat his cause.[42]

F. Defamation

In *Morehead v. U. S. F. & G. Co.*,[43] defendant was surety on the bond of plaintiff, and in accordance with a statute[44] filed a petition with the board of supervisors, stating that it believed itself in danger of suffering by reason of its being surety, and asking to be relieved of the obligation. As provided by the statute the application was published in a newspaper of the county. Thereafter plaintiff sued for libel contending that the statements published were calculated to create the impression that plaintiff was untrustworthy as an official and had been unfaithful to his duties. Defendant's demurrer was sustained and plaintiff appealed.

In affirming the ruling the Court held that the surety company had a legal right to be relieved of its liability under the statute, and that it would be unreasonable to require a surety company to run the gauntlet of a libel suit upon the filing of such application. In addition, the Court was of the opinion that the statement was not libelous in that it did not necessarily impute the libelous meaning attributed to it by plaintiff, since there were many reasons why a surety might wish to be relieved of its liability irrespective of any distrust of the principal. The Court approved the rule that where a statement is reasonably capable of several meanings, some of which would be defamatory and some not, the burden is on the plaintiff to prove that it was reasonably and properly understood by the persons to whom it was published as being used in the defamatory sense.

In *Sumner Stores of Miss., Inc. v. Little*,[45] defendant's manager accused an employee of theft. The Court held that even treating the case as one of qualified privilege, malice in fact was shown by the testimony of the manager himself. The manager denied the making of the statement, denied the existence of any basis for the charge, or that he had any cause to believe the plaintiff guilty. Thus, the finding by the jury that he did make the utterance, warranted them in inferring malice in fact.

In *Willis v. McCarty-Holman Co.*,[46] plaintiff had purchased and paid for an article from the defendant's self-service store, and another article from another store. Plaintiff returned to defendant's store and obtained a package of dates and had his purchase wrapped in the same package with

[42]Yazoo & M. V. R. R. v. Smith, 196 So. 230 (Miss. 1940); Southeastern Express Co. v. Namie, 182 Miss. 447, 181 So. 515 (1938).
[43]192 So. 300 (Miss. 1939).
[44]Miss. Code Ann. (1930) §2895.
[45]192 So. 857 (Miss. 1940).
[46]193 So. 337 (Miss. 1940).

the other articles. The cashier saw the other articles in the bag but said nothing to plaintiff; but upon learning from another cashier that the plaintiff had not paid for any other articles on this occason, pursued the plaintiff. Upon overtaking the plaintiff the cashier stated that she had not paid for the other articles, to which plaintiff replied that she had.

Plaintiff instituted an action in tort and defendant was granted a peremptory instruction. On appeal the judgment was affirmed, the Court upholding the statement as qualifiedly privileged, and stating that while the uncivil conduct of the cashier was censurable, such faults should be met by the rectifying processes of commercial competition and not by actions at law.

G. Miscellaneous Wrongs

(1) Intentional Aggressions—Conduct of Peace Officers

In *Maryland Casualty Co. v. Eaves*,[47] the Court considered the question of whether an officer was acting "by virtue of or under color of his office" so as to render the surety on his official bond liable for his misconduct. It was held that where an officer allegedly made an assault after stating that he was arresting plaintiff, his bondsmen were liable even though the arrest were not consummated.

(2) Deceit—Misrepresentations as To Financial Standing of Third Person

In *S. D. Sojourner & Co. v. Joseph*,[48] plaintiff alleged that defendant made certain representations concerning the financial standing of a third party, and that in reliance thereon plaintiff entered into transactions with the third party and suffered loss. Under the evidence it was held a question for the jury whether the statements were made. In addition the Court stated that the requirement of scienter was present if defendant made the statements recklessly and without regard to their truth or falsity, or as of knowledge when he was without knowledge.

With reference to the causal connection between the misrepresentations and plaintiff's loss, the Court approved the general rule that it is not essential that the defendant's statements be the sole cause for plaintiff's action, it being sufficient if they are a material inducing influence.

Defendant had been granted an instruction which in effect stated that if plaintiff had learned from other sources that the third party had no credit standing he was not entitled to act in reliance on defendant's statements. The Court stated that this was error, since contributory negligence was no defense to an action for fraud. It is generally true that contributory fault of the plaintiff does not preclude recovery in an action of deceit. However, the basis for this principle is that contributory negligence

[47]196 So. 513 (Miss. 1940).
[48]186 Miss. 755, 191 So. 418 (1939).

is no bar to an action for intended wrongs, of which deceit is one.[49] Accordingly, certain cases have recognized that, although proof of plaintiff's negligence will not avail against an *intentional* misrepresentation, it may be a defense to an action based on *negligent* misrepresentation.[50]

(3) Malicious Prosecution

In *State Life Insurance Co. of Indianapolis v. Hardy,*[51] the defendant company held both a conventional lien and a landlord's lien on certain products of one Hardy; in addition the company held Hardy's note. Upon Hardy's death, his wife paid that portion of the note which constituted rent for the current year, but denied knowledge of any other indebtedness or lien, and asserted that there was no landlord's lien on current crops for rent due from preceding years. The wife removed certain agricultural products from the premises, and the collecting agent of the insurance company thereupon instituted civil and criminal proceedings. The affidavit charged plaintiff with removing property subject to a landlord's lien; whereas the crime, if any, would seem to consist of having removed property subject to a conventional lien. After acquittal, the wife instituted suit for malicious prosecution against the insurance company and its agent and recovered judgment.

On appeal, two dissenting justices took the view that, although the plaintiff was not guilty of the crime charged, the affidavit could have been amended to charge a crime under Sections 1019-20, Mississippi Code of 1930. To this the majority replied that it was doubtful whether the affidavit could now be regarded as amendable; and that in any event the wife had no notice of the conventional lien, or intent to defeat or impair it, and thus was not guilty of crime. Consequently, defendant was unable to avail himself of the rule that the guilt of the person prosecuted is a defense to a subsequent action for malicious prosecution.

In addition the Court stated that the requirement of malice was sufficiently made out if the prosecution was primarily instituted for a purpose other than that of bringing an offender to justice. The institution of prosecution for the purpose of facilitating the collection of a debt was held improper so as to render the prosecution malicious. The fact that the agent acted under advice of counsel was held no defense, in view of the fact that there had been no full disclosure to the attorney.

However, judgment was rendered in favor of the insurance company on the ground that the collecting agent was acting outside the scope of his employment in instituting criminal proceedings. Criminal prosecution is

[49] HARPER, TORTS (1933) §224.

[50] *Ibid.* See also Linington v. String, 107 Ill. 295 (1883); Conway Nat. Bank v. Pease, 76 N. H. 319, 82 Atl. 1068 (1912). If defendant's negligent statement can be characterized as "reckless or wanton", it would seem that negligence on the part of plaintiff might be no defense.

[51] 195 So. 708 (Miss. 1940).

not an appropriate means of collecting an indebtedness, and authority to institute such could not be inferred from his employment.

(4) Liability of Manufacturers of Products Intended for Human Consumption

The weight of American authority permits a recovery by a consumer against a manufacturer for the negligent preparation or manufacture of food, irrespective of any contractual relations between the parties.[52] The courts have developed theories of implied warranty of wholesomeness and fitness for the purpose for which the product was sold, and in many instances liability has been imposed without any showing of negligence. Irrespective, of the warranty theory, the courts have applied the general law of torts to manufacturers of food products and have imposed upon them the obligation to use due care toward persons likely to consume the product.

Under the decisions of the Mississippi Court, in most cases it makes little difference whether the action is brought in tort or warranty. The plaintiff makes a jury issue upon showing that the product contained foreign matter when opened. In tort cases the doctrine of *res ipsa loquitur* applies and plaintiff is not required to adduce affirmative proof of negligence. However, in tort cases where the defect complained of is not such as to make it reasonably inferable that it resulted from the fault of the manufacturer, this doctrine is inapplicable. In addition, if the suit is brought upon warranty, where the purchase is made on Sunday, the Court has adopted the view that the contract is void and no implied warranty arises.[53] This exotic curiosity has been a source of consternation to many plaintiffs litigant.

In *Johnston v. Swift & Co.*,[54] suit was brought for illness which plaintiff sustained as a result of eating canned sausage prepared by defendant. In the lower court a declaration was filed basing the action upon warranty; but defendant's demurrer being sustained on the ground that the sale was made on Sunday, plaintiff amended and proceeded in a tort action. The lower court granted a peremptory instruction for defendant on the grounds (1) that plaintiff was *in pari delicto,* since the sale was made on Sunday. and could not recover even in tort, and (2) the evidence of negligence of defendant was insufficient. On appeal the Court recognized that the first ground was erroneous and considered the case from the standpoint of the second.

Plaintiff had had no opportunity to examine the remaining contents

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[52]See Notes (1934) 7 MISSISSIPPI LAW JOURNAL 203, (1937) 9 MISSISSIPPI LAW JOURNAL 365; and cases collected Note (1929) 63 A.L.R. 340, 343.

[53]Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97 (1925).

[54]186 Miss. 803, 191 So. 423 (1939). See also Meridian Coca Cola Bottling Co v. Illges, 191 So. 817 (Miss. 1939).

of the can until some time after his illness, because of his confinement at home. Ten days later, an examination disclosed the unwholesome condition of the can. The Court held that evidence of the condition then was not competent to show the condition at the time of opening. Moreover, under the evidence it was possible that the unwholesomeness of the food was attributable to lack of refrigeration or other circumstances over which the manufacturer had no control. Accordingly, the doctrine of *res ipsa loquitur* was held inapplicable, and in the absence of an affirmative showing of negligence on the part of the manufacturer, recovery was denied.

(5) Tort Liability of Municipalities

The common law doctrine of governmental immunity had its origin in the ancient maxim "The King can do no wrong." In connection with municipal corporations there is an important qualification of this principle of non-liability. A distinction has been drawn between the governmental functions and the corporate functions of municipalities. For torts of its agents acting in a governmental capacity there can be no legal redress; whereas if the wrong is committed during the exercise of its merely corporate powers, liability may be imposed.[55]

In *City of Meridian v. Peavy*,[56] plaintiff brought suit for damages, alleging that the city had partially obstructed a culvert by a sewer pipe which caused debris to accumulate and block the culvert, causing water to back up on plaintiff's property and injure his residence. Plaintiff was granted an instruction which in effect stated that he should recover unless his damage was caused solely by an unprecedented rainfall. On appeal the instruction was held erroneous in assuming that the city was guilty of negligence, whereas the conflicting evidence on this point was for the consideration of the jury. Principles governing municipality liability in condemnation proceedings were held inapplicable since the suit was predicated solely on the theory of negligence.

In *Warren v. City of Tupelo*,[57] plaintiff brought suit for injuries received when struck by a falling limb of a tree situated in the neutral ground. The accident occurred about a month after a violent storm. Plaintiff contended that under the evidence, constructive notice of the dangerous condition was imputed to the municipal authorities. In the lower court the defendant was granted a peremptory instruction.

Affirming this ruling on appeal, the Court stated that the duty of the municipality was to keep its streets and sidewalks reasonably safe for persons who were themselves using due care, that the duty extended to protection from dangers both overhead and underfoot, but that the duty was not absolute. The Court stated that no regular inspection of the

[55] HARPER, TORTS (1933) §295.
[56] 194 So. 595 (Miss. 1940).
[57] 194 So. 293 (Miss. 1940).

trees was required of the defendant and that in view of the recent violent storm the authorities might reasonably have inferred that all dead or defective limbs had been stripped from the trees. It was shown that persons daily using the streets had not noticed the twisted condition of the fallen limb; and that under all the evidence the danger was so well concealed that the imposition of liability in the present case would constitute the city an insurer.

XI

WILLS, ADMINISTRATION AND TRUSTS

*W. G. Roberds**

A. Wills

(1) Nature

Following the usual "we hereby convey and warrant" clause (describing the land), an instrument contained these provisions:

> "It is provided herein and made a part hereof, that this deed is not to take effect until the death of W. N. Ates one of the grantors except that the grantee is to have a home on said land. It is further provided herein and made a part hereof that Mrs. W. N. Ates, the other grantor, is to have a home on said land as long as she may live thereon after the death of her said husband, the said W. N. Ates, provided she remains single, but should she marry again this right would hereby cease.
>
> "It is further provided herein and made a part hereof that Lillie Mae Ates and Gwendolyn Ates, Grantor's Daughters, are also to have a home on said land so long as they may live or remain single, but in case they marry or either of them this right will cease as to the one or both that marries."[1]

The Court held that this instrument was not a deed, since it conveyed no present interest in the land, and that it was testamentary in its nature; that the provisions for grantees to have homes were too general and uncertain, since it could not be determined how much land was to be included in the home, or where the home was to be located on the premises.

(2) Contest

The case of *Fortenberry v. Herrington*[2] is a very important case dealing with the contest of a will. In substance, the Court in that case

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[1]Ates v. Ates, 196 So. 243, 244 (Miss. 1940). For a detailed discussion of the previous Mississippi cases on this question, see Note (1938) 10 Mississippi Law Journal 183.

[2]196 So. 232 (Miss. 1940).

held (1) that the question of testator's mental capacity is for the jury, unless the verdict is against the overwhelming weight of the evidence, in which case the cause will be remanded for a new trial; (2) that mental capacity is tested as of the date of the execution of the will; (3) that the burden of showing mental capacity is on the proponent of the will; (4) that a testator has testamentary capacity if at the time he executes the will he (a) is able to understand and appreciate the nature of his act, the natural objects or persons to receive his bounty and their relation to him, and (b) is capable of reasoning as to how he desired to dispose of his property; (5) that non-expert witnesses may give their opinion as to mental capacity, after they have stated the facts upon which they base such opinion; (6) that the testimony of attesting witnesses is entitled to greater weight than witnesses who had no duty to perform about the execution of the will; (7) that it is not only the duty of attesting witnesses to see that the testator properly executes the will but to observe whether he has the mental capacity required by law; and (8) that communications by the testator to the attorney who drew the will made in the presence of third persons are not privileged communications and such attorney is competent to testify as to such communications.[3] The Court did not so decide in this case, because it was not necessary, but inferentially it held that if the communications to the attorney by testator were made when no other person was present, that such communications would be privileged. It appears the attorney was not an attesting witness to this will.

(3) Construction

In *Guinn v. Gordon*[4] the will devised a plantation to a daughter, and gave her the right to hold the property or sell it, with the proviso that if the daughter should sell the plantation, one-sixth of the purchase price should be paid to a named person or her heirs. The Court held that the requirement of paying one-sixth of the proceeds was applicable only if the daughter should sell the land instead of keeping it, and that the title vested in the daughter's heirs in fee simple on the daughter's death where she had not made a sale; that a mortgage on the lands by the daughter was not a sale but was a valid mortgage; that while generally power to sell does not vest power to mortgage, yet, in this case, since there was no sale, the daughter owned the fee simple title and could give a valid mortgage.

In *Wheeler v. Dalehite*,[5] the original will, after devising lands to the widow, recited "and at her death to be sold and divided equally between my four daughters and my grand-son, Leonard Wheeler." A codicil provided that this will "is to be carried out, except one change, and this change is to the effect, that Leonard Wheeler my grandson is to receive only half of what each of my daughters Mattie, Mildred, Katie and Floy receive from my estate." The Court held that the will and codicil were not am-

[3]The Court relied upon Nebham v. Mansour, 162 Miss. 418, 139 So. 166 (1932).
[4]186 Miss. 771, 192 So. 25 (1939).
[5]193 So. 5 (Miss. 1940).

biguous and the grandson took only half of what each daughter received, and that the meaning was so plain "as not to need testimony to show what the testator meant."

In the case of *York v. York*,[6] the Court construed the will as defining as an advancement and not a debt money which testator, from time to time, had paid to the defendant, and that attachment of lands of defendant in Mississippi would not lie, defendant being a non-resident.

The case of *Lindeman's Estate v. Herbert*[7] involved the validity of an alleged gift *inter vivos* of corporate stock of the value of some twenty thousand dollars, which stock had also been bequeathed by the owner in her will, which will, executed before the alleged gift, directed that the stock be sold, along with other assets, to pay various legacies. There was much testimony on the issue of the gift, but the pertinent facts were: that the donee of the stock was also the beneficiary of other property in the will; that the donor endorsed the stock—rather, wrote her name on the back of it; but that Mosal, the donee, was not mentioned in this endorsement. Testatrix lived some five months after this alleged gift and did not change her will. During this time she also drew the dividends on the stock. The donee was the agent and manager of the donor, who was quite old, and was also executor of the will. The Court held that under all the facts there was no gift, and that where the confidential relation existed, as here, the burden was upon the donee to show a valid gift.

(4) Administration

In *State Tax Collector v. Massachusetts Bonding Co.*,[8] the venue of an action against the executrix of the estate of one who, it was claimed, was a defaulting tax collector and also against his non-resident surety, was in the county where the estate of such collector was being administered, even though there are other defendants to the suit, some of whom may reside or be found in counties other than that in which the letters testamentary were granted.

In the case of *Lee v. Lee's Estate*,[9] it was shown that Mrs. M. T. Lee and E. T. Lee were wife and husband and Mrs. Annie Lee was the mother of E. T. Lee. Annie Lee owned a farm in Mississippi, which E. T. Lee managed for her. Mrs. M. T. Lee resided on her separate property in Louisiana. Mrs. Annie Lee became ill and moved to the home of Mrs. M. T. Lee for care and attention, orally agreeing to pay Mrs. M. T. Lee $30 per month for board, lodging and laundry, there being no agreement as to when this should be paid. This arrangement continued from 1929 to 1936, when Mrs. Annie Lee died. E. T. Lee was appointed administrator of her estate in Issaquena County, Mississippi. Mrs. M. T. Lee probated

[6]193 So. 330 (Miss. 1940).
[7]193 So. 790 (Miss. 1940).
[8]191 So. 285 (Miss. 1939).
[9]186 Miss. 636, 191 So. 861 (1939).

a claim against the estate of Annie Lee for (1) board, lodging and laundry for the seven years, (2) for money which had been paid for drugs, bedding, doctors and other expenses on account of Mrs. Annie Lee, and (3) funeral and burial expenses. The heirs of Mrs. Annie Lee contested the claims, contending (a) that under the laws of Louisiana there was a legal duty on this son, E. T. Lee, to care for and support his mother, and (b) that the claim was barred by the statute of limitations. The Court held (1) that even though Louisiana did have a statute making it the duty of a child to support the parent, that it had no application here because, first, the statute only applies where the parent is unable to support herself, which was not the fact here, and, second, the claim here was not by the son of Mrs. Annie Lee but by her daughter-in-law, who, even though Mrs. Annie Lee might have been a pauper, was under no legal duty to support her; and (2) that the claim was not barred by the statute of limitations, because there was no agreed maturity date, and, therefore, the claims for board, lodging and laundry and also money expended by Mrs. M. T. Lee for funeral and burial expenses were allowable claims against the estate, but that the claim for money paid by Mrs. M. T. Lee for other expenses was not a valid claim against the estate, because it was not shown that these accounts were charged to Mrs. Annie Lee.

In *Whitehead v. Puffer,*[10] the Court held that where a probated claim shows on its face that the claim was barred by the statute of limitations before the death of the debtor, the claimant cannot, at the hearing on the contest of the claim, make proof of facts not appearing on the face of the probated claim that decedent was estopped at the time of his death to plead the statute of limitations.

In *Fidelity Mutual Life Ins. Co. v. Goldstein*[11] it was held that the notes need not be physically attached to the affidavit proving the notes for probate, where the notes were duly filed and the affidavit described the notes accurately and in detail.

In *Faris v. Edmondson*[12] it was held that where payments on a trust deed note made during the lifetime of the payee were not sufficient to discharge the principal, and subsequent payments were made to the payee's administrator after the payee's death, claim for items in excess of the principal of the note paid to the administrator was not required to be probated.

In *Hickman v. Slough,*[13] the Court found that the proof showed that the claimant against the estate of one Sullivan, deceased, had waited on and nursed Mr. Sullivan for four years pursuant to an oral agreement that the claimant should be paid out of the estate of Mr. Sullivan, who desired

[10]192 So. 566 (Miss. 1940).
[11]192 So. 584 (Miss. 1940).
[12]192 So. 825 (Miss. 1940).
[13]193 So. 443 (Miss. 1940).

to keep for an emergency what cash he had on hand, he being eighty-two years of age when the services began. Having decided the fact of the agreement, the Court held that it was a legal agreement, and, there being no amount stipulated in the agreement as to the value of the services, claimant was entitled to "reasonable value of such services."

A somewhat similar case to this was that of *Stephens v. Duckworth.*[14] Here the special master allowed the claimant $1900 payable out of the estate of one Tullos. The chancellor set aside this allowance and finding by the special master. The Supreme Court, on the record, found that Tullos was an old man; that he became ill; and that he had an oral agreement with Mrs. Stephens to the effect that if she and her children would move into his home and care for him, that he, Tullos, "would give her the home place and everything;" and that she did so move and cared for him for eight years. There was no proof offered of the reasonable value of the services. The Supreme Court held (1) that the agreement to give Mrs. Stephens the land was unenforceable as against the Statute of Frauds,[15] but that she should be allowed the reasonable value of her services, and (2) that she was not to be paid until after the death of Tullos, and, therefore, the statute of limitations had not run, and (3) that this was not such a claim as had to be probated, and (4) "as a sensible and experienced person, the master could determine the value of Mrs. Stephens' services, as well as could the witnesses," and that, therefore, no proof of the value of such services need be introduced before the master.

It is difficult to understand how the Court could hold that, since the specific agreement to convey or devise lands to Mrs. Stephens was unenforceable, it followed she was entitled to the reasonable value of her services; and that the special master could decide upon the reasonable value of such services without any proof of any kind as to such value. The decision seems more a humane than a legal decision, since to have denied Mrs. Stephens remuneration, under the facts of the case, would have worked on her a grave injustice and hardship.

In *Clarksdale Hospital v. Wallis,*[16] the other beneficiaries under the will unsuccessfully contested the claim of the hospital to a legacy of $30,000 as being against the Mortmain Statute, and the Court held that the fees of the solicitors for the hospital could not be made a common charge against the estate of the testator.

In *Ralston v. Bank of Clarksdale,*[17] the Court held that the allowance by the chancery court of compensation to an executor and his solicitor was a matter of discretion with the chancellor within the limits fixed by Section 1740, Code of 1930, and such allowance so made would not be disturbed

[14]196 So. 219 (Miss. 1940).
[15]Nothing was said in the opinion as to whether personal property was covered by "the home place and *everything.*"
[16]193 So. 627 (Miss. 1940).
[17]194 So. 923 (Miss. 1940).

by the Supreme Court unless the proof showed that there was a manifest abuse of discretion by the chancellor.

Another case dealing with allowance of solicitor's fees was that of *Hutton v. Gwinn,*[18] in which the Court held that under Sections 1734 and 1891, Code of 1930, attorney's fees in the management of statutory estates are not a charge upon the estate itself, but are personal obligations of the administrator or executor or guardian, and the allowance which the court may make is an allowance to the administrator or executor or guardian and must be made upon petition of such legal representative, and the attorney himself cannot present such petition in his own name for the allowance. The Court confined the rule to statutory guardianships (which was the case before them). It did not decide, but indicated the rule would be different in testamentary guardianships.

In *Hancock's Estate v. Pyle,*[19] it was held that only a creditor, legatee or distributee of the estate is entitled to ask for letters of administration on the estate, and that before a creditor is entitled to have letters of administration issued, such creditor must at least make a prima facie showing that he is a creditor; that merely to allege in the petition that decedent was indebted to petitioner for rent of lands which he had occupied under purchase at a void foreclosure sale was insufficient, but that the petition should state wherein the sale was void, and the chancellor should "have inquired into that issue, and to have required the petitioner to show that prima facie she was a creditor of the estate."

B. Trusts

In *Tanous v. White,*[20] Punchard agreed to sell to White and Jenkins 87 acres of land in Warren County, which lands had been for a number of years, and were then, occupied by White and Jenkins as lessees of Punchard. Punchard wanted cash, and Tanous orally agreed with White and Jenkins to lend them the money with which to pay Punchard, the lands to be conveyed to Tanous to be held by him as security until the debt should be paid. Pursuant to this oral agreement the deed was made to Tanous, and Tanous paid to Punchard the purchase price of $600. No mention was made in the deed of any trust; it was a straight warranty deed.

The Court held that the oral agreement of Tanous to convey to White and Jenkins the lands upon payment to him of the purchase price was not within the Statute of Frauds; that this transaction was the same as though Tanous had delivered the money to White and Jenkins and they, in turn, had delivered it to Punchard; that this was a trust, and a court of equity could and should require the conveyance of the lands to White and Jenkins upon their paying Tanous the money.

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[18]195 So. 486 (Miss. 1940).
[19]193 So. 812 (Miss. 1940).
[20]186 Miss. 556, 191 So. 278 (1939).

In another trust case, *Lewis v. Williams*,[21] Tony Williams owned 280 acres of land. On April 6, 1933, the lands were sold to the State for non-payment of taxes. On March 25, 1933, Tony and his children conveyed the lands to Patrick Williams. On January 18, 1934, Patrick executed a quit claim deed conveying 120 acres of the lands to Tom Lewis. On January 25, 1934, the State issued a patent to Edna Washington to 160 acres, and one to Patrick Williams for 120 acres of this tract of 280 acres. On December 1, 1934, Tom Lewis conveyed part of his land to Arthur Williams. On October 2, 1935, Tony Williams died, leaving as his heirs at law Patrick Williams, a son, Edna Washington, a grand-daughter, and a daughter, the wife of Tom Lewis. In the negotiations to obtain the patent from the State it appears that none of the parties had the money with which to procure the patents and they tried to borrow the money. The money lender said he would not lend it to Patrick but would lend it to Edna Washington and her husband, Leander, and to Tom Lewis. This was done, and Patrick agreed to convey to them the 120 acres of which he was named as patentee, which he later did. He claims that it was orally agreed that he had the right to pay the patent money and require deeds to be executed to him by the other parties, which he offered later to do, and they refused to so convey. The Court held that this oral agreement, under these circumstances, did not constitute a trust and was within the Statute of Frauds, remarking that Patrick Williams never paid any money whatsoever.

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[21]186 Miss. 701, 191 So. 479 (1939).

THE WORK OF THE 1940 SESSION OF THE MISSISSIPPI LEGISLATURE

*Gerard H. Brandon**

Needless to say, within the scope of an article in the Law Journal it is not possible to review all of the work of the Legislature of Mississippi for the regular session of 1940, comprising as it does some six hundred pages of printing in the bound volumes. It will not be practicable for that reason to discuss with any great detail those enactments which may be considered of active and vital interest to the members of the Mississippi Bar. Reasonable brevity allows no more than a summary to serve as a guide post to those of us who are inclined to put off the abstract reading of the new laws and checking the provisions of the new against those of the old. The fault in this treatment lies, however, in the fact that the writer, in selecting for discussion adoptions or changes he thinks worthy of note, may omit reference to other statutes of even greater importance. So the first warning post that should be set up should read: "Go to the statutes and read; rely not upon what another says is the law."

This article upon the work of the Legislature for 1940 omits entirely all references to appropriations, revenue measures, privilege tax laws, school legislation, boards of supervisors and other boards, social security and advancement legislation and the like, and is confined to those statutes which seem to affect the lawyer in his every-day practice.

Criminal Practice and Procedure

Generally that branch of our practice which incites the greatest interest, at least amongst the laity, is that of the criminal law and criminal practice and procedure. After much argument and with no little difficulty our law makers have evolved a unique contraption for finally disposing of those who have been adjudged beyond all further help from or need for lawyers. Let us each hope that the new traveling seating accommodation provided for by Chapter 242 will not too soon be brought around for the final comfort of any unfortunate client of our own.

An improvement has been made in the provisions of Section 817, Code of 1930, by Chapter 243 of the Laws of 1940 by extending the designation of what may be burglarized to include with "shop, store, booth," etc., any private room or office in any such building, other than in a private dwelling house.

The most interesting provisions with regard to administration of our criminal law, however, are those contained in Chapter 300 whereby juvenile courts are established in each county for administration of quasi-criminal proceedings against offenders and violators of the criminal laws who may be under eighteen years of age, and who are therein defined as

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"delinquent children." Inasmuch as this act makes no provision for payment of a competent probation officer, and inasmuch as the Legislature failed to make suitable appropriations for maintenance of the "delinquents" in proper state institutions, this act is causing many headaches to law enforcement officers, particularly in those counties having no county court. Needless to say, a circuit judge, presiding over some five or six counties, cannot be always in session as a juvenile court. As word has got about that those under eighteen years of age cannot be jailed, some to be expected increase in "juvenile" infractions of the law has resulted. Undoubtedly this statute is a step in the right direction, being an effort to avoid diverting minor offenders toward a life of crime, but the plan cannot be expected to succeed without the establishment of proper tribunals, officers, and institutions adequately paid and financed.

Chancery

Suits to confirm titles to real estate or to cancel clouds upon titles may now be brought, tried, and determined by the chancellor in vacation by virtue of Chapter 244, amending Section 320 of the Code of 1930. It is not entirely clear when the cause will become triable, such action not being *ex parte* in nature. Presumably, after the rule day at which answer is required, the chancellor may enter an order or rule, upon motion, designating a time for trial short of the next succeeding term, or may at a term designate by order a vacation date for trial.

In this same connection it should be noted that by Chapter 309 the Legislature has recognized the necessity that uncertainty existing as to the validity of public land titles be put at rest, and so has provided that any patentee or claimant of land under any state patent of lands forfeited for taxes, whether he be in possession or not, or be threatened to be disturbed in possession or not, may proceed against the State in the chancery court where the land or some part may be, to have his title quieted and confirmed. Of interest is the provision of Section 2 of this act granting "large discretion and far reaching powers" to the court in fixing the validity of the title; and thereby it appears that the decision need rest only in the discretion of the chancellor. Decrees of validation, by Section 3 of the act, are expressly directed except where it shall be found as a fact that the State never acquired title by the tax sale, or that the title was divested out of the State by fraud or without payment of the purchase price.

The obvious purpose of this statute is to avoid completely the effect of recent decisions of our Supreme Court involving titles to state patented lands, for it in practical effect commands the court to confirm the titles in the absence of a finding of the facts above mentioned.

With regard to minors' business and affairs, two statutes were enacted by the 1940 Legislature, both having to do with service of process upon relatives or joinder thereof in petitions.

The first of these, Chapter 236, dealing with proceedings for removal of disabilities of minority, amends Sections 354 and 355, Code of 1930. In such proceedings it is now required that in the application the parent or parents then living shall be joined, but if neither be living two of the *adult* of kin of the minor related within the third degree, computed according to the civil law, shall be joined. Upon filing the application of the minor by his next friend, as heretofore, process shall be had upon such relatives, being the parent or parents then living, or if there be neither, then upon two *adult* kin within the required degree. It may be noted that the statute no longer expressly requires that the places of residence of parents or kin be stated in the application, although it seems that the better practice would be to so require.

By Section 2 of this Chapter, amending Section 355 of the Code, it is provided that process need not be issued if the parent or parents then living, or if they both be not living, if any two of this *adult* kin within the third degree, shall unite with the minor and his next friend in the application. Further, if the minor has no living parent and no kindred (note the omission here of the qualifying word *adult*) within the prescribed degree whose place of residence is known to him or his next friend, it shall not be necessary to make any person a defendant to the proceeding.

It follows, of course, that the facts in the latter instance must be made affirmatively to appear in the application, and should be found to be true by proper recitals in the decree; but in any event, in view of the omission of the word *adult* above noted, an *ex parte* proceeding would be inadvisable if, though no adult relatives were known, there be known minor relatives within the third degree. The latter class of relatives should not, of course, be permitted to join, but should be served with process as is otherwise required upon minors.

The second of these enactments is somewhat similar in the nature of the change, being Chapter 250, Laws of 1940, amending Section 1883 of the Code of 1930. This deals with proceedings for the sale of land for the interest of a minor ward. Here again the qualifying and restricting word *adult* has now been inserted in designating what relations of the minor shall be joined by process upon filing a petition for such sale; and the law now requires, in such cases, that where there be no near adult relations of the minor in the state, the court shall designate a guardian *ad litem* upon whom process may be had and who shall be required to answer on behalf of the ward.

Section 323 of the Code of 1930 has been made more certain as to the procedure for obtaining reduction in the amount of bonds of administrators, executors, guardians, receivers, etc., in that the chancery court or chancellor in vacation is authorized in proper cases to cancel or reduce a bond upon a petition being filed whereby the need therefor shall appear, and upon five days service of a copy of the petition (in lieu of a writ of

summons) upon the surety. This amendment is effected by Chapter 254, Laws 1940.

In the administration of the estate of one who has died testate, it must be noted that although directions of the will must be followed for the sale of property, payment of debts and legacies, and management of the estate, the executor shall *in all cases* make publication for creditors to probate their claims, as required in the administration of the estates of intestates, and *with like effect, any provisions of the will to the contrary notwithstanding.* Such is the effect of Chapter 232, Laws 1940, amending Section 1622, Code of 1930.

The Mortmain Law

Sections 269 and 270 of our State Constitution having been duly amended so as to remove certain restrictions of our fundamental law against charitable and religious devises and bequests, our 1940 Legislature by Chapter 318 put into effect the permitted provisions of the constitutional amendment by in turn repealing Sections 3564 and amending Section 3565 of the Code.

Whereas heretofore since the adoption of the Constitution of 1890, no devise or bequest of any real property or proceeds thereof in favor of any religious or ecclesiastical corporation, society, denomination or association, or to any person for any charitable use or purpose either directly or, in trust, indirectly, was permitted; and whereas no testamentary gift or bequest of money or personal property, directly or indirectly, in favor of any such religious or ecclesiastical corporation, society, denomination or association, either for its own use or for charitable uses and purposes, was permitted, by the present law, subject to restrictions, devises and bequests of lands, personalty, money, and all property may be made to both religious and charitable corporations, societies, associations, etc., and for religious and charitable uses and purposes. The present statutes, containing ample restrictions for the protection of near and dependent relatives, should enable much public good to be accomplished by devises and bequests to religious, educational, civil, and charitable organizations; and it should be the duty of each lawyer called upon by a client to assist in preparing a last will or codicil to advise of the change in law permitting such devises and bequests to be made.

Briefly there are no restrictions at present against such bequests except (a) the devise or bequest must be made at least ninety days before the death of the testator, and (b) such bequests and devises shall not exceed one-third of the estate if the testator be survived by spouse or child, or descendant of a child.

Other provisions in the act worthy of note are those restricting the time during which any land so devised may be held without disposition, and those subjecting same to taxation.

Other Court Provisions

By Chapter 229, Laws of 1940, amending Chapter 256, Laws of 1932, appeals from the equity side of the county court on application made therefor and bond being given, shall be to the chancery court. Those from the law side, of course, continue to be made to the circuit court.

By Chapter 233 provision is made for transfer by the circuit, chancery, county, or justice of the peace court, of any cause in which the court in which the action is brought has jurisdiction of the subject matter but lacks venue. In such cases the action shall not be dismissed, but, upon objections made, shall be transferred to the venue to which it belongs.

Of particular interest and great importance is Chapter 246, which fixes the venue of any action for recovery of damages against a non-resident of the state in the county in which the cause of action accrued. Service of process may, in such cases, be had in any county where the defendant, or any of them, may be found.

By this statute, any non-resident person, firm, or corporation not qualified under the corporation laws to do business in this state, who shall do any business or perform any character of work or service in this state, shall thereby be deemed to have appointed the Secretary of State and his successors to be the agent of such non-resident for service of process, upon whom service may be had in any action accruing from the doing of business or performing work or service in this state.

Provision is made for service, in such actions, upon the Secretary of State, notice to the non-resident, etc., this provision being similar to that made for service upon non-resident users of the public highways of this state who may have become liable for some injury to persons or property.

It will be noted that by Chapter 245 of the Laws of 1940, Section 61 of the Code of 1930 has been amended by the insertion of language whereby ten days from date of adjournment is given within which an appeal may be taken by any person aggrieved by judgment or decision of the board of supervisors or municipalities of any city, town, or village.

By Chapter 132, the Legislature has conferred upon the Mississippi Public Service Commission jurisdiction to determine, after reasonable notice and hearing and upon petition by the attorney general, whether any domestic telephone or telegraph public service corporation operating within the jurisdiction of that commission is rendering in a reasonably adequate manner the public service authorized by its charter of incorporation. This statute sets forth the subjects upon which the commission at such hearing shall make specific findings of fact, and, following the precedent of many of our federal statutes, provides that "the findings of fact by the commission, if supported by substantial evidence, shall be conclusive and shall not be reversed by any court." A review of the determinations and decisions of the commission may be had by the circuit court of the First Judicial

District of Hinds County, Mississippi, upon petition for writ of certiorari; and, thereupon, appeals may be had in due course to the Supreme Court. Under this statute the commission is vested with authority to order changes in service which it finds may reasonably be made to secure reasonably adequate service, and, in default by the public service corporation, the commission is granted authority to forfeit the charter of incorporation upon five days notice and a hearing accorded upon such forfeiture proceeding. The review above mentioned may be had either by the attorney general or by the corporation affected; but upon certiorari the Court shall have authority to review only errors of law, and, if none be found, it shall be incumbent upon the reviewing court to affirm. Such review may be had only within ten days from the entry of the commission's order.

With respect to civil actions wherein a public officer is sued out of the county of his household and residence, although a surety or sureties or some of the sureties on his official bond, or other joint defendant, be sued with him and be found in or subject to an action in such other county, it is provided that the venue shall be changed on his application to the county of the household and residence of such public officer, if such application be made before the jury is impanelled; and that this shall apply regardless of whether the suit is filed before or after such officer's term of office has expired. This is by virtue of Chapter 248 of the Laws of 1940, amending Section 495 of the Code of 1930, which was silent as to whether such venue provisions should apply when suit was brought after the expiration of the term of office of the officer sued.

Chapter 249 of the Laws of 1940, amending Section 3663 of the Code of 1930, entitles the mayor or council or board of aldermen of any municipality to require of the attorney general an opinion in writing upon any question of law relating to his municipal duties. These officers were thereby given a privilege which had previously been allowed to other enumerated officials.

As a safeguard to officers of the state, county, and municipalities, and to the various commissions, trustees, etc. entitled to request opinions from the attorney general, it is now provided that when any such officers, board, commission, department, or person shall have in accordance with the act requested and obtained an opinion in writing from the attorney general and acted thereon and in accordance therewith, there shall be no liability, civil or criminal, accruing against any such officers, board, commission, department, or person for having so acted, unless a court of competent jurisdiction, after a full hearing, shall judically declare that such opinion is manifestly wrong and without any substantial support. Provision is made that no such opinion shall be given or considered if the opinion is given after suit is filed or prosecution begun against any such officers, board, commission, department, or person.

Miscellaneous

By Chapter 237 of the Laws of 1940, amending Section 2121, Code of 1930 as amended by Chapter 354 of the Laws of 1938, persons who are or were citizens of the United States, and who have become or may become aliens by reason of marriage to an alien, may nevertheless hereafter inherit lands and interest in lands in the State of Mississippi, and may continue to hold, own, and transmit by descent or transfer lands which may have been by such person inherited or acquired prior to becoming an alien by reason of marriage, all free from escheat to the State of Mississippi, if said land has not heretofore been escheated by final valid order or decree of a court of competent jurisdiction. By this act pending escheat proceedings against all excepted persons are ordered abated and dismissed.

Thus are removed the penalties of this nature heretofore fixed upon a person becoming an alien by reason of marriage to a citizen of a foreign country.

By Chapter 114 of the Laws of 1940, standing timber is exempted from all ad valorem taxes, and, in lieu thereof, a severance and production tax is imposed upon every person engaging in or continuing within this state the business of felling, cutting, severing, or producing timber or the products thereof from the soil for sale, profit, or commercial use, or in buying, logging, or selling timber or its products for commercial purposes, the amount of the tax being 3% of the value of the timber or product at the point of severance. By this act it is incumbent upon all persons purchasing logs and timber products to see that the tax is paid to the State, such tax being primarily chargeable to the owners of the timber; but, if it be not paid by them, it shall be collected from the purchaser thereof or by the person engaged in producing or severing the timber or its products from the soil.

By Chapter 113 of the Laws of 1940, the sales tax provisions on timber products are eliminated by amendment from Section 2-a of Chapter 119 of the Laws of 1934 as amended by Section 2 of Chapter 158 of the Laws of 1936; and therefore the only tax now levied upon timber and timber products is the 3% severance tax provided in Chapter 114, Laws of 1940, above mentioned.

To those who represent corporations or who may be so fortunate as to receive dividends from stock held in corporations, or may be called upon to advise individuals and co-partnerships with reference to the advisability of incorporating, the amendments to the income tax law contained in Chapter 123 are of interest. Thereby income received during a taxable year in the form of dividends paid by corporations are to be included in computation of gross income of individuals, and the $1,000.00 specific exemption heretofore allowed to corporations is eliminated.

By Chapter 124, by reciprocity provisions, a citizen of another state

is exempted from payment of income taxes on income received from within the State of Mississippi if the state of the residence of such citizen by its laws likewise extends the same or like exemption to citizens of this state.

Note should be taken of the provisions of Chapter 291 regulating assignment or pledge of wages for payment of or as security for the purchase of or contract to purchase any goods, wares, or merchandise. By this statute it is provided that no such assignment or pledge shall be valid against or binding upon any employer for any wages due or to become due and owing unless the assignee or pledgee, prior to the delivery of goods, wares, or merchandise, or prior to the consummation of the contract for purchase, shall serve upon the employer of the employee an executed copy of the assignment or pledge or contract, and obtain the employer's acceptance of such notice and his agreement in writing to be bound by the terms thereof. This statute should prove a safeguard, not only to employers who thereby need not be concerned or annoyed by assignment to numerous persons of the wages of the employee, but to the employee himself as well, making it difficult for him to mortgage his future earnings for the purchase of articles which may not be necessities.

Small bank loans repayable in installments are the subject of regulations as to interest, service charges, etc., by the provisions of Chapter 204; and it is now permissible for an insurance company to issue a policy of life insurance in an amount not exceeding $5,000.00 in any one year on any one life without a medical examination of the insured, whereas the limit on amount was formerly $2500.00—this by virtue of the provisions of Chapter 205 of the Laws of 1940, amending section 5158 of the Code of 1930.

As at first suggested, time and space will not permit discussion of some work of great importance done by the 1940 session of our Legislautre. Its enactments brought about the revision and the clarification of the Unemployment Compensation Law, Chapter 295, amending certain Sections of Chapter 147 of the Laws of 1938; the adoption of Chapter 147, creating the Mississippi Board of Development as a replacement or successor to the State Industrial Commission, which was set up during the former administration; provisions by Chapter 294 for the care of delinquent children through the State Department of Public Welfare and subsidiary county departments and boards; the free text book law; amendments (by Chapter 298 of the Laws of 1940) of the law providing for old age assistance set up by Chapter 175 of the Laws of 1936, subsequently amended in 1938; provisions (Chapter 287 of the Laws of 1940) making it mandatory upon municipalities having a paid police department or a paid fire department to set up a disability and relief fund and an administration board for the administration of that fund, subject to countermand by municipal elections under certain provisions; and many other statutes in furtherance of the trend for improved social and economic conditions of workmen and persons who may become dependent.

In conclusion, attention is called to the fact that by Chapter 156, public boards and commissions, particularly the State Highway Commission and boards of supervisors, are specifically prohibited from increasing their pay-rolls immediately prior to election. Under the provisions of Chapter 256 it is left to the discretion of boards of supervisors whether or not they will maintain a fence around the court house yard, whereas such a fence was required (though seldom maintained) by Section 221 of the Code of 1930, and, in fact, since the memory of man runneth not to the contrary. And by Chapter 138, amending Section 5024 of the Code of 1930, Thanksgiving Day will be at the pleasure of the President of the United States.

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The JOURNAL aims to print matter of merit and interest and, although desirous of offering freedom of expression to contributors, assumes no responsibility for the views expressed herein.

Law School to Hold Oil and Gas Institute

The Law School wishes to announce that it has arranged for an Institute on the Law of Oil and Gas, to be held in the Law Building at the University on Friday, January 10th. The country's two outstanding legal authorities in the field have been secured as lecturers. They are Professor Walter L. Summers of the University of Illinois School of Law, author of the leading treatise on the subject; and Professor A. W. Walker, Jr., of the University of Texas School of Law, author of numerous law review articles and leading authority on the Texas law of oil and gas. These gentlemen are forceful and effective lecturers who have participated in other institutes on the subject, and it is hoped that a large number of the lawyers of the State will find it possible to attend the Institute.

Announcement of the exact subject-matter of the lectures will be made soon, and a copy of the program will be mailed to each practicing lawyer of the state.

STATE BAR SECTION

TO THE PRACTICING LAWYERS OF MISSISSIPPI:*

At the recent 1940 session of the Legislature of the State of Mississippi, amendments to the Constitution were made and adopted in manner as provided by law, which repealed and amended the Mortmain Sections of the Constitution of Mississippi of 1890, to-wit: repealed Section 269 (see Miss. Laws, 1940, c. 325, p. 579), and amended Section 270 (see Miss. Laws, 1940, c. 326, p. 580), so as to permit bequests and devises to religious, educational, civil, and charitable organizations.

The corresponding statutory Mortmain Sections of the Code of Mississippi of 1930, to-wit: Sections 3564 and 3565, were repealed and amended, respectively, to accord with the new Constitutional Section 270 (see Miss. Laws, 1940, c. 318, p. 576).

Hereinbelow is set forth, by proper legal, corporate name, a list of charitable, religious, and educational institutions to which such bequests and devises may be legally made under said statutory and constitutional provisions and limitations, to-wit:

CIVIL EDUCATIONAL INSTITUTIONS

University of Mississippi, University, Miss.
Mississippi State College, State College, Miss.
Mississippi State College for Women, Columbus, Miss.
Mississippi Southern College, Hattiesburg, Miss.
Delta State Teachers College, Cleveland, Miss.
Alcorn A. & M. College, (Col.) Alcorn, Miss.
Piney Woods Country Life School, (Col.) Piney Woods, Miss.
Utica Normal and Industrial Institute, (Col.) Utica Institute, Miss.
Prentiss Normal and Industrial School, (Col.) Prentiss, Miss.

EDUCATIONAL INSTITUTIONS

Belhaven College, Jackson, Miss.
Millsaps College, Jackson Miss.
Mississippi College, Clinton, Miss.
All Saints College, Vicksburg, Miss.
Chamberlain-Hunt Academy, Port Gibson, Miss.
French Camp Academy, French Camp, Miss.
Sisters of Mercy in Vicksburg, Vicksburg, Miss.
Bishop of Natchez, and His Successor in Office, of the Roman Catholic Church, as Trustee for the Endowment Fund for the

*The following statement was submitted by Major W. Calvin Wells, one of a committee of the Mississippi State Bar which was very instrumental in bringing about the recent change in the Mortmain Sections of the Mississippi Constitution and Code.

Education of Young Men of Mississippi to the Priesthood, Natchez, Miss.

CHARITABLE INSTITUTIONS

Mississippi Baptist Orphanage, Jackson, Miss.
Mississippi Orphans' Home, Jackson, Miss.
Palmer Orphanage, Columbus, Miss.
The Mississippi Childrens' Home Society, Jackson, Miss.
Old Ladies' Home of Mississippi, Jackson, Miss.
Old Men's Home, Jackson, Miss.
D'Evereux Hall Orphan Asylum, Natchez, Miss.
St. Mary's Orphan Asylum of Natchez, Natchez, Miss.
Natchez Protestant Home, Natchez, Miss.
The Y. M. C. A. of any city in the State.

HOSPITALS

Mississippi Baptist Hospital, Jackson, Miss.

STATEMENT OF THE CHAIRMAN OF THE JUNIOR BAR SECTION

To The Members Of The Mississippi State Bar:

The younger members of the legal profession and of the Mississippi State Bar are exceedingly proud of the fact that they now have a definite channel whereby it is possible for them to take a more prominent part in the functions of the Mississippi State Bar. It is my opinion that the effectiveness of the activities of our Junior Bar has increased yearly since its organization and beginning in 1936. It seems to encourage the leaders of our Section to work harder with each year's program when they hear the older lawyers state that the efforts of the leaders of the Junior Bar have been successful from many standpoints and also that the Section is an asset to the Association.

The Executive Committee in cooperation with your Chairman has been busy since our meeting in June with the sincere desire of making this year the most successful of them all. The Executive Committee met on August 15 in Jackson, Mississippi for the purpose of surveying the proposed projects for the year and to decide whether or not this would be a full program, or if new projects should be adopted. Your new officers have, by mimeographed letters sent to every member of the Junior Bar Section, given each an opportunity to signify his preference of the various committees and to offer any constructive suggestions or advice. Your Chairman believes that more interest is being shown throughout every section of the state and it is hoped that this will be a continuous interest and that same will be transformed into material accomplishments. The members of the Executive Committee discussed in detail the program of the Public Relations Committee and the proposal of re-creating a Com-

mittee on Unauthorized Practice of the Law. Your Chairman is of the opinion that there is a definite need for much effort on the part of the individual members of the Section toward eliminating the many acts of individuals, officers, banks, trust companys, real estate agents, and corporations which are infringing upon the practice of law and which are unauthorized by the statutes governing such.

In accordance with the actions of our Junior Bar Section at the last meeting, as well as suggestions made by individual members in response to the letters referred to, the Executive Committee has adopted a program of activities to be carried out by the following committees:

1. Legislative Drafting Committee. The purpose of this committee is to prepare legislation for the creation of a Legislative Drafting Bureau in view of the fact that the Section in its last meeting instructed that such legislation be promulgated.

2. Bureau Of Identification Committee. This committee was authorized to continue with the work which has been endorsed by the State Bar Association. This committee has the duty and responsibility of following up the proposed recommendation for the creation of a Bureau of Identification, Investigation and Statistics in Mississippi and to redraft the act for the purpose of eliminating any objectionable features from a legislative or constitutional standpoint. Hon. Eugene Morse, President of the Mississippi State Bar, appointed a committee to cooperate with the Junior Bar Section in this regard which is composed of Walker Broach, Jr., Meridian, Chairman; Means Johnson, Greenwood; and J. Will Young, Jackson.

3. Committee For Cooperation With Young Lawyers. The purpose of this committee is to do everything within its power to aid and assist lawyers who are preparing to enter the practice of law in our state and to furnish all available information that might aid them in finding a suitable place to locate.

4. Code Committee. In view of the importance of this committee's work and the advantages derived from the reports of the past committees on this subject, the Junior Bar Section voted to continue this committee for the purpose of drafting and recommending such changes in the present statutes of Mississippi as are deemed advisable and such new legislation as the committee thinks should be enacted.

5. Committee on Pleading, Practice and Procedure. As signified by the title, this committee is to study the present laws and rules governing pleading, practice and procedure in Mississippi and encourage the members of the Junior Bar Section to study the report of the Study Committee of the State Bar in order that they might familiarize themselves

sufficiently with the provisions of the report and be prepared to vote intelligently when said report is presented at the next annual meeting.

6. Legislative Committee. The purpose of this committee is to guide through the Legislature such legislation as was recommended by the Junior Bar Section.

7. Committee on Admission to the Bar. At the last meeting this committee was instructed to prepare legislation for an amendment to the Board of Bar Admission Statutes in line with the written report made by last year's committee. Also the question of a law to provide more strict regulations in the reciprocity statutes was referred to this committee.

8. Public Relations Committee. At our meeting in June of this year, it was decided that this committee conduct an educational program in the high schools and junior colleges of our state and bring to the attention of the students the Bill of Rights of the Constitution, and a program has been adopted by the Executive Committee for this purpose. It is important that the chairman of this committee have the assistance of many members of our Section and I will, therefore, appreciate each member responding to any request made by him in this regard.

The success of this year's activities depends upon the officers and their ability to plan a meritorious program and select the chairmen and personnel of the committees. This has been done and therefore, the success of our Section is dependent upon the work to be performed by the various committees.

It has been the observation of the past leaders that the success of the Junior Bar Section was dependent upon the cooperation of each individual member as well as the assistance, counsel, and advice given by the older members. Judging from the evidence we have thus far, I sincerely believe that the officers of your Section for this year will receive the cooperation and assistance needed for carrying out the objectives which have been adopted.

We will be grateful to the members of the Mississippi State Bar for any further suggestions, advice, or criticisms, as this will be the only way we will be properly informed in order to perfect our program.

GEO. M. ETHRIDGE, JR., Chairman

Junior Bar Section of the Mississippi State Bar.

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BIOGRAPHICAL SKETCH

SARGEANT S. PRENTISS AS A LAWYER

*W. H. Watkins**

Mississippi was admitted into the Union as a State in 1817. The United States had acquired from France what is known as the Louisiana Purchase, and from Spain the territory over which is asserted sovereignty east of the Mississippi River. The great Father of Waters for the first time flowed unvexed to the sea. Guided by its current and attracted by the romance of the territory, there came to the tier of counties in southwest Mississippi, along the Mississippi River, a vast tide of immigration. There were planters, merchants, teachers and lawyers. The population of the State in 1820 was approximately 42,000 persons; in 1830, it had increased to 70,000.

During that period, the most colorful man who came to the state and the man who made the most profound impression was Sargeant S. Prentiss, the subject of this sketch. He was born in the State of Maine in September, 1808. He graduated with the degree of Bachelor of Arts in September, 1826, at Bowdoin College, a name rendered famous by the number of distinguished men among its alumni. On account of his precociousness and ease with which he acquired knowledge, the youth, Prentiss, was permitted to enter the Junior Class of this great College. The very next year, in 1827, he landed from a steamboat at Natchez, Mississippi, practically penniless, and within three weeks thereafter became the tutor for the Shields family residing at Rokeby, in Jefferson County.

Prior to coming to Mississippi, he had determined to enter the law and had devoted himself to its study. On the 13th day of June, 1829, the Judges of the Supreme Court of Mississippi were in session at the town of Monticello, Lawrence County, Mississippi, where Mr. Prentiss, barely twenty-one years of age, applied for admission to the bar. On a recent visit to this interesting County seat, situated on the west bank of Pearl River, which became at an early date a seat of wealth and culture, I made an effort to secure the records showing his application and admission to the bar. Such records, however, were destroyed by a fire which damaged the courthouse some years ago. It is said, however, that Mr. Prentiss passed a creditable examination though he told his brother that he was discouraged over the outcome "on account of the crowded condition of the profession," a matter about which you young gentlemen will hear more later.

The Mississippi bar at that time was distinguished by the ability of its members. He first began the practice of law at Natchez, and among the

*An address before the University of Mississippi Law School by Hon. W. H. Watkins, President of the Mississippi State Bar, 1939-40.

distinguished lawyers composing the bar were George Quitman, John T. McMurran, George Winchester, and Alexander Montgomery. About the first of February, 1832, he moved to Vicksburg, where the bar likewise was distinguished for its great ability. There were W. L. Sharkey, known as the greatest of our Chief Justices; John I. Guion, Prentiss' law partner, who afterwards became a member of our Supreme Court; W. C. Smedes; Joe Holt, known as the "Demosthenes of the Bar"; A. G. McNutt, H. S. Foote and others.

A newspaper published at Natchez in 1837 contained the following description of Vicksburg:

> "Vicksburg is visible nearly ten miles before reaching it, on going up the river. Its situation is highly romantic; it is built on a congregation of hills, which slope abruptly to the water. From the foot of this irregular side to the summit, the dwellings are scattered in the most picturesque manner. The streets parallel with the river rise one above the other, so that the galleries of the houses on one often project over the roofs of those on the other. Cottages in every shape and form, perched on every accessible point on the cliffs, add much to the beauty of the place. The population has doubled within four years."

There, Mr. Prentiss assiduously devoted himself to the practice of law so long as he lived in the State.

The reputation of Mr. Prentiss as a lawyer has been greatly overshadowed by his supreme ability as an orator and public speaker. He not only had natural gifts of an unusual order but the habits of his life naturally fitted him for that great field of human endeavor. As an infant he suffered a violent fever which resulted in a lameness which followed him to the grave. By reason thereof, he was debarred from athletic sports, was confined the greatest portion of his time to his room, which necessarily required him to seek intellectual cultivation. He was of an exceedingly studious nature, acquired knowledge with great rapidity and possessed a most retentive memory. He read rapidly, digesting the contents of a page at a mere glance. He had a brilliant and vivid imagination by reason of which he was enabled to express himself in a language of unsurpassed beauty. He fed his imagination by memorizing Shakespeare, Byron, Scott, Milton, The Arabian Nights, Aesop's Fables and the Bible, and he could without apparent effort from memory quote at great length from each of them. His mind was stored with a wide field of fiction and romance which contributed to the charm of his speeches and conversation. He diffused life into Greek and Roman Mythology and said that "a classical allusion or a quotation from the poets was as effective in the backwoods of Mississippi as in the Halls of Congress." His very appearance indicated his oratorical gifts. Although of medium height, his

carriage was singularly impressive and conveyed an idea of wonderful power. He had a sweet, clear, musical voice, which was improved and rendered somewhat fascinating by a slight lisp. He not only had very great natural gifts but he had disciplined himself so that he might become a great speaker. He had so trained his voice as that while speaking with perfect composure, he could be heard at an immense distance. In that respect he equaled the great revolutionary evangelist, Whitfield. He cultivated form and style with great care. People listening to his speech received the impression that it was purely a gift of nature, and certainly, no man could ever have spoken as he did without the great talents he possessed. But Prentiss himself knew how much he owed to discipline. Perfection in oratory, just as in art, sculpture, or painting, is attainable only through continuous self-training.

The accounts of the effect of his oratory, combined with his remarkable personality, on public audiences is remarkable. He sometimes spoke to as many as 20,000 people, and he said that large audiences electrified him. All contemporary writers bear unanimous testimony to the almost magical effect which he had upon his audiences. Joseph Baldwin, the author of *Flush Times in Alabama and Mississippi,* who was a contemporary of Prentiss, uses the following language:

> ". . . At this day it is difficult for any one to appreciate the enthusiasm which greeted this gifted man, the admiration which was felt for him, and the affection which followed him. He was to Mississippi, in her youth, what Jenny Lind is to the musical world, or what Charles Fox, whom he resembled in many things, was to the whig party of England in his day."

It is stated that at times when speaking the entire assembly were convulsed with emotion; some wept, some laughed hysterically, some became pallid with fear. They stated that Mr. Prentiss spoke as no other man had ever spoken; that it appeared that all the Gods had contributed to form him. Every person within the sound of his voice was captivated by it.

Dr. H. S. Fulkerson, who has written a most interesting book on *Recollections of Early Days in Mississippi,* states while Prentiss was in the zenith of his power, he himself was deputy clerk of the Circuit Court in Claiborne County, Mississippi; that he had heard Prentiss speak often and the enthusiasm incited by Prentiss "survived longer than that of any speaker of modern times." He stated that he at the time of writing the book was still under the magic spell of Prentiss' oratory. He states that in 1844, Prentiss spoke at Rodney, Mississippi, to a vast audience of men and women; he stood within a few feet of him and that he, with the crowd, was simply entranced; they shouted and wept and in the excitement aroused by the eloquence of the speaker rolled on the ground.

Mr. Prentiss was a most versatile man. He could speak at great

length without any apparent effort. Upon one occasion there was to be held a Fourth of July celebration in the town of Port Gibson; some of Mr. Prentiss' friends asked him if he was going to speak. He stated he had not been invited to do so, but would, if called upon. He was asked upon what subject he expected to speak. He told them he did not know, he could speak on any subject. After some bantering, he proposed to his questioners that if he were called on to speak, if one of them would hand him the subject upon which it was desired that he speak, written on a piece of paper, he would speak upon that subject. As usual the crowd began to call for Mr. Prentiss to speak; they always did. As he went upon the platform, somebody handed him a small memorandum upon which was written the word, "Guano"; he looked at it and tore it up. He spoke for over an hour. As usual he enthralled the crowd; they cheered him, laughed and wept, and when at the end of an hour he started to close, they begged him to go on. It is stated, however, that he never mentioned the word, "Guano", during the entire speech.

In 1837, while still in his twenties, Prentiss was elected to Congress. His right to take the seat was contested. Prentiss was permitted to appear before the House and present his views in support of his right to the seat. This was probably the most famous speech he ever made. It lasted three full legislative days. He was listened to with rapt attention. Among the auditors were Caleb Cushing of Massachusetts, John Adams (then a member of Congress), Henry Clay, and Daniel Webster. At its conclusion, Daniel Webster put his arms around him and pronounced it was the greatest effort he had ever heard. This speech gave him a national reputation. He was in constant demand as a public speaker. Wherever he went, whether to New York, Washington, or Boston, a committee called upon him and invited him to speak. It is stated that if he appeared in a small town in Mississippi, the populace appealed to him to make them a speech.

His excellent voice was constantly heard in the interest on important public questions. He was inherently honest. He exercised all the powers which he possessed to prevent the repudiation of the Mississippi bonds, but without avail.

Coming to the question of Prentiss as a practicing lawyer, we are, of course, confronted with the fact that, while his great speeches are fully recorded and the history of Mississippi for that period may not be adequately written without giving consideration to the influence and the impression he made upon the people of the state, his reputation and character as a lawyer rests upon somewhat different basis. The speeches which he made in the court and before the jury are not reported. A lawyer may make the greatest effort of his life presenting a case in an empty courtroom, with no one present but the court officers and opposing counsel. Necessarily, therefore, the proper estimate of every lawyer is formed by the members of the bar and the courts before whom he appears.

The reputation of Prentiss as a practicing lawyer, for the foregoing reasons, is necessarily overshadowed by his pre-eminence as a statesman and orator. The judges and members of the bar, however, who practiced law during that time, are unanimous in the honor and esteem in which they held him as a lawyer. He seemed to challenge their admiration. Due to the pre-eminence of his abilities he appeared to have excited no jealousy. There was no one else in his class. Baldwin says that he manifested greater ability as a jurist and lawyer than as an orator, and he informs us that the Chief Justice of the High Court of Errors and Appeals of Mississippi stated Prentiss appeared to a greater advantage in arguing a case before the court than as a public speaker and that one of the Judges of the Supreme Court of Alabama, who heard him, stated that he "shone most conspicuously" in arguing cases before the court. Baldwin says he was a "lawyer's lawyer." That is to say, he was able to show other lawyers what the law was, one of the greatest compliments that can be paid to any practicing lawyer.

It would be easy to believe, in fact it would be impossible to believe otherwise than that as an advocate before juries, he was almost invincible.

Mr. Claiborne, in his *History of Mississippi,* states that Prentiss in addressing a jury has never been surpassed: "Pith, pathos, humor, fiery declamation, biting sarcasm, wonderful power of illustration, were the characteristics of his oratory on these occasions, and so expressive were his action and the play of his countenance, that even when you failed to hear him, you comprehended what he had said. His great forte was in the analysis of a point of law, or the discussion of a constitutional question. His style then became terse, simple, severe, exhibiting a mental discipline and a faculty of concentration, in striking contrast with the natural exuberance of his fancy."

It is said that he defended hundreds of criminals over the State of Mississippi and lost but one major case. In attributing guilt to an individual during the life of Prentiss and for more than a generation afterwards, a general, much-used expression was "the man is so guilty that even Prentiss couldn't have cleared him." Giving him the closing argument before the jury was the equivalent of giving him the verdict.

It is stated that he once went into the wilds of Mississippi east of Rankin County, argued a civil case before the jury, and whereupon the following verdict was rendered: "We, the jury, find for Mr. Prentiss."

Mr. Prentiss was fully aware of his power over a jury and for that reason he would rarely prosecute a criminal case. He stated that this would be taking advantage of the defendant and that some injustice might be done. He prosecuted, however, in the case of *State v. Phelps.* Shields refers to the facts as follows:

"It was a case of purely circumstantial evidence; the murderer was identified as being seen near the spot of the tragedy, etc. The conclusive circumstance, however, that fastened the guilt upon him was, that close by the body of the dead man was found the wadding of the gun; this wadding was a piece of newspaper, which, upon being smoothed out, to a jot fitted into a torn place in a newspaper found in Phelp's pocket. While Prentiss, with masterly hand, was unfolding link by link the chain of testimony which fastened the act upon the prisoner, he sat glaring upon the speaker like a tiger ready to make his spring.

"Phelps was convicted and sentenced to be hung. The subsequent part of his brief remaining career has a tinge of romance. He actually sent for Prentiss and unbosomed himself; he told him of his early life and of his fall, and that he had taken an assumed name, and would never let his family know of his tragic end. He told Prentiss that while he was speaking in the case he intended at one time to spring upon him, and escape in the melee. Prentiss replied to all of this, 'I saw it all and was ready for you.'

"Phelps afterward broke jail and was pursued, but had to be shot before he would surrender, preferring, as he said, to die by the bullet than the rope; but in this he was disappointed; he was wounded, captured, and on the appointed day expiated his crimes upon the gallows."

Another famous case, in which Prentiss prosecuted, was that of *State v. Byrd*.[1] A Mr. Cameron, a planting partner of A. G. McNutt, living on a plantation a few miles back of Vicksburg, mysteriously and suddenly disappeared. Search was made and a pond on the premise was drained. Suspicion was directed towards his slaves and one of them was tried and convicted. Byrd was a freed person of color and suspicion falling upon him, he was searched and the watch of Cameron was found upon him. Prentiss consented to prosecute and Henry S. Foote defended. He obtained a change of venue to Raymond in Hinds County, Mississippi, was tried, convicted and his conviction affirmed. He was hanged at Raymond, Mississippi. Before his execution, however, he made a full confession implicating other persons. This information, however, was suppressed through Henry Foote, his counsel. A volume published and titled *Early Recollections of Mississippi,* states that he involved a person holding high office in the State and that Cameron was killed because he had a very young and beautiful wife.

His most famous criminal case was the defense of Judge Edward C. Wilkinson, of Mississippi. On the 15th of December, 1838, Judge Wilkinson had gone to Louisville, Kentucky en route to be married to a Miss

[1] 1 How. 247 (Miss. 1835).

Crozier, a neice of General Thomas Hinds, one of Mississippi's most distinguished citizens, a brave assistant of General Jackson at the Battle of New Orleans and the man for whom Hinds County is named. While in Louisville, they became embroiled with a merchant tailor by the name of Redding, concerning the delivery of some wearing apparel which Judge Wilkinson had ordered. A controversy took place between Redding and some of his friends and Judge Wilkinson and his companions, which resulted in the killing of a man by the name of Meeks. The fact that Meeks was a working man aroused a great deal of prejudice against Judge Wilkinson and his associates from Mississippi. Prentiss, who was his intimate friend, volunteered to defend him. The Legislature of the State of Kentucky granted a change of venue in the case to Harrodsburg, and the case came on for trial in the following month of March. Prentiss was leading counsel for the defense, and his speech has become one of the classics of the bar. It is stated that he preyed upon the emotions of the jury as well as the audience in the courtroom; that he used cynicism, sarcasm, as well as humorous illustrations; that at one minute the crowd would laugh and then it would melt into tears. The question turned upon who was the aggressor, Judge Wilkinson or the decedent. Mr. Prentiss very adroitly called the attention of the jury to the fact that it was very unlikely Judge Wilkinson would have sought a difficulty under the circumstances. He used the following language:

> "There is one other argument in favor of the view that I have taken of the origin of this unfortunate affray, which may be properly introduced at this time, and with which I shall close this branch of the subject.
>
> "It arises out of the respective characters and positions in life of the two parties, and is, in my opinion, entitled to great weight. Who, in view of his character and situation, was most likely to have sought and provoked the unfortunate conflict—Judge Wilkinson or Mr. Redding? The conduct of the Judge, under the opprobrious epithets heaped upon him by Redding, in the barroom, sufficiently indicates, that though he had previously given way to sudden passion, he was now cool, collected and forbearing. His mind had recovered its balance, and he behaved on this occasion, as well as subsequently, with philosophical calmness. I doubt, gentlemen, whether any of you would have permitted Mr. Redding to indulge, with impunity, in such unmeasured abuse. But the situation of the Judge was peculiar, and every inducement which could operate upon a gentleman, warned him against participation in broils and battles. With buoyant feelings and pulse-quickening anticipations, he had come more than a thousand miles, upon a pilgrimage to the shrine of beauty, and not of blood; upon an errand of love, and not of strife. He came to transplant one

> of Kentucky's fairest flowers to the warm gardens of the sunny South. The marriage feast was spread; the bridal wreath was woven; and many bounding hearts and sparkling eyes chided the lagging hours. The thoughts of the bridegroom dwelt not upon the ignoble controversy, which, for an unguarded moment, had occupied his attention, but upon the bright and glorious future, whose rapturous visions were about to become enchanting realities."

Judge Wilkinson was promptly acquitted by the jury. Even the Attorney General of Kentucky, Mr. Hardin, who prosecuted the case, paid a deserved tribute to the skill and ability and eloquence of Mr. Prentiss.

It is stated that in the examination of witnesses, Prentiss showed great skill, wasted no time by irrelevant questions, brought out the facts in the natural and simple order, and asked only questions relevant to the issues in the case. He examined as few witnesses, and elicited as few facts as possible.

Turning for a few minutes to Prentiss as a lawyer in civil matters and in the trial of civil cases, one finds that his reputation in this respect has been overshadowed by his fame as an orator and a criminal advocate. The practice of civil law was necessarily crude. There were comparatively few law books. Not a single legal textbook was published in America at the time when Prentiss came to the bar. Blackstone defined law as "a rule forbidding wrong and commending the right." Prentiss defined it as "anything which might be boldly stated and plausibly maintained." That is to say, anything you could get by with. In the trial of a civil case, the proper object seemed to be on the part of the defendant to prevent the presentation of the real issues in the case. If suit was brought, so Mr. Baldwin says, upon a promissory note, defendant's counsel might file eight or ten special pleas. Plaintiff's counsel would be in great doubt as to what course to take. If they demurred to the pleas and a single demurrer was overruled, the defendant would take judgment. If they took issue on the pleas, an adverse judgment might be met because the court might decide that issue had been taken on an immaterial point. The question of attaining equal justice between the parties never entered into the proceedings. "The longest pole got the persimmons." In forming an estimate of Prentiss as a civil trial lawyer, the conditions under which he practiced law must necessarily be realized.

Upon one occasion, Prentiss tried in Jefferson County, Mississippi, the will case of *Cowden v. Dobyns*.[2] Prentiss consumed seven hours in presenting his client's contentions. He met an adverse verdict and opposing counsel, Mr. Winchester, twitted him, asking him how he could make such an eloquent argument when he had neither the law nor the

[2] 24 Miss. 486 (1852).

facts on his side. Mr. Prentiss replied that there was a mistaken impression prevailing among laymen that the best argument in a case always won and that he realized he was employed frequently by reason of his powers of advocacy. He stated there was nothing for him to do but speak.

Mr. Prentiss practiced law in Mississippi from 1829 to 1845 and enjoyed an extensive civil practice. The Circuit Court Docket of Warren County, Mississippi, shows that from November, 1832, through May, 1836, he had 333 civil cases on the docket; that at the November term, 1836, he had 122 cases; that at the October term, 1840, he had 201 cases. His services were in demand all over the State of Mississippi. He traveled on horse-back, meeting courts in the various circuits of the state and made numerous trips up and down the Mississippi River on palatial steamboats. He had an extensive practice in Adams, Jefferson and Claiborne Counties; and, in his letters to his sister, he tells of taking a trip by steamboat 100 miles up the Mississippi to Princeton, then the County seat of Washington County, which many years ago caved into the river. We find from the records, while he was a member of the Mississippi bar, he argued forty cases in the Supreme Court of the State of Mississippi. In the case of *Byrd v. State*,[3] the Court said that the case was argued "with zeal and ability." In the case of *Planters Bank v. Snodgrass*,[4] the Court stated that the case was argued "with zeal and ability by counsel for both parties."

In the case of *Doss v. Jones*,[5] the Court held in a slander suit that if the defendant pleaded a justification, unless some evidence of the truthfulness of the derogatory statement was offered by the defendant, express malice might be presumed. This is a very fallacious doctrine. It lay dormant in Mississippi law for nearly ninety years and was recently referred to and affirmed by the Supreme Court of Mississippi in the case of *Louisiana Oil Company v. Renno*,[6] and *Sumner Stores v. Little*,[7] where a verdict, for accusing a youth of stealing a pair of $1.25 shoes, for $12,500.00, was sustained. The same rule was announced in *Reliance Mfg. Co. v. Graham*.[8]

The most interesting civil case reported in which Prentiss was a counsel is *Ross v. Vertner*.[9] An act of the Mississippi Legislature in 1822 prohibited the emancipation of slaves either during the lifetime of the owner or by last will and testament, unless such slave had performed some meritorious act for the benefit of the owner and unless sanctioned by an act of the General Assembly. Isaac Ross was a very wealthy resident of

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[3] 1 How. 247 (Miss. 1835).
[4] 4 How. 573 (Miss. 1840).
[5] 5 How. 158 (Miss. 1840).
[6] 173 Miss. 609, 157 So. 705 (1934).
[7] 192 So. 857 (Miss. 1940).
[8] 181 Miss. 549, 179 So. 341 (1938).
[9] 5 How. 305 (Miss. 1840).

Jefferson County, Mississippi, and a large slave owner. On the 26th day of August, 1834, he made a will in which he created a trust fund to be used in freeing and transporting such of his slaves as might survive him and so desired to Liberia. Upon his death his heirs-at-law contested the validity of the will on the ground it violated the Mississippi Statute prohibiting the manumission of slaves. Prentiss was employed to uphold the will and in his brief showed a most excellent conception of the public policy upon which the statute rested. He used the following language:

> "We contend that this section is a mere municipal regulation, aiming simply at the internal policy of the state, and prohibiting emancipation only within its limits. We deny that the emancipation which results from a removal of slaves to a foreign country, is embraced within its letter or its spirit.
>
> "In the earlier history of the slave-holding states, the power of manumission was but little restricted by legislative enactments. But it soon became apparent that the frequent exercise of this power was productive of a great evil, by the rapid increase which it caused in the free negro population. This kind of population was found by experience to be both oppressive and dangerous, constituting a heavy charge upon the public and a great nuisance to the community. It became, therefore, the necessary policy of these states to rid themselves of this evil, and as far as practicable, to prevent its further extension. In pursuance of this policy, they proceeded, by various legislative enactments, to diminish the rights and increase the responsibilities of free negroes: and, as a branch and parcel of this system, have, most, if not all of them, placed various restrictions, limitations and conditions upon the owner's right of manumission, which had been the prolific source of the mischief. It may be safely asserted that every such limitation or restriction of the right of manumission, was intended by the legislature only to relieve the state from the accumulation within its borders of an obnoxious free black population. All laws of this sort will be found to aim at this object alone; and to this extent, and no more, have they been enforced by the judicial tribunals."[10]

The opposing view was presented by the Hon. J. B. Thrasher, a distinguished Claiborne County lawyer. The Court sustained the validity of the disposition of the will as not being in violation of the statute and made special reference to the "zeal and ability with which able counsel had presented the case." The Court used the following language:

> "The act of 1830, of that state, provides, 'that no slave shall be emancipated but by act of the legislature.' The courts say, that

[10] 5 How. 305, 345 (Miss. 1840).

> although the provision is general, and might seem to prohibit emancipation out of as well as within the state by a citizen, yet such construction would be manifestly contrary to the spirit of the law. 'The evil was the increase of free negroes in the state by emancipation.' 'The removal of slaves belonging to citizens of the state, and their emancipation in parts beyond her territorial limits, was no injury to her.' 'It will not be denied', says the court, in continuation, 'that the owner might have removed his slaves from this state at any moment, and for any purpose he pleased.' And it is laid down as a general rule, to which there is no exception, unless by express statutory provision, 'that the owner of property may, by his will, direct his executors to dispose of it in any way which he could.' The importance of the case to the parties and to the country, the zeal with which the able counsel who argued it, resisted the conclusions of the court, as well as the agitation it has produced in the country, are the reasons which have induced me to adduce this superadded authority to support the judgment of the court."[11]

The City of Vicksburg is located on property which belonged to a man by the name of Newton Vick. After his death it was contended by the City of Vicksburg that Mr. Vick in his lifetime, and his executor subsequent to his death, had dedicated to the City of Vicksburg a very valuable portion of the property. Mr. Prentiss represented, in the litigation occasioned thereby, the members of the Vick family and was successful in procuring an opinion from the High Court of Errors and Appeals of Mississippi adverse to the claim of the City of Vicksburg.[12] The Court indicated in the opinion thereof, though such expression was *obiter dictum,* that the sons of Mr. Vick took title to the land involved. Mr. Prentiss received as his fee a portion of the land valued at approximately $100,000.00. He took possession of the property and constructed improvements thereupon, which included a hotel situated under the hill on the banks of the Mississippi River. It was known as "The Prentiss Hotel". Subsequently, however, the daughters of Newton Vick asserted an interest in the property. Suit was filed in the Federal Court at Vicksburg, Mississippi, and the Supreme Court of the United States held that the daughters shared equally with the sons in the disposition of the estate of Newton Vick. This decision had the effect of depriving Mr. Prentiss of the valuable property which he had acquired and which he considered adequate for all purposes.

Mr. Prentiss appeared as counsel in the Supreme Court of the United States in at least one famous case, that of *Sampeyreac v. United States.*[13] He was opposed by Mr. Taney, the Attorney General of the United States,

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[11]5 How. 305, 362 (Miss. 1840).
[12]Vick v. Vicksburg, 1 How. 379 (Miss. 1837).
[13]7 Pet. 222 (U.S. 1833).

who afterwards became Chief Justice of the United States and delivered the opinion of the Court in the famous *Dred Scott Case.* The members of the Court were singularly impressed and were most complimentary of Mr. Prentiss' presentation of the case and his remarkable personality.

In 1845, Mr. Prentiss moved to New Orleans, and with great ability and industry mastered the civil law prevailing in that State. He became an eminent member of the bar in that state, where his extraordinary genius challenged the admiration of the members of that bar. While a resident of New Orleans, a great portion of the time he lived at the old St. Charles Hotel.

He died in Natchez, Mississippi, at "Gloucester," the home of his wife's parents, which is now one of the show-places of that interesting city.

Among the tributes paid him was that of the Rev. C. K. Marshall, a famous Methodist Minister of Vicksburg, who used the following language:

> ". . . His genius was not measured by the ordinary standard of a frontier criticism or the judgment of an enthusiastic population of an uninformed and miscellaneous adventurer. He was surrounded by a citizenship of the South of unexampled ability at the bar, on the bench, in the forum. In some things there were many his equals, but taken as a complete man, with his native forces, his creative imagination, his capacious memory, his coruscating, exhaustless fancy, his rare and fearful logic, his wit and sarcasm, his splendid diction, his charming voice, his glorious eye and rarely beautiful and radiant face, he had no peer. He must be forgotten before he can be matched."

Prentiss stated that he wished to be buried where the uncaged birds sang, the unpruned vines and the wild flowers grew. If you will take occasion to visit this secluded spot, overlooking the Mississippi River, where his remains are buried, you will be impressed with the fact that his wish was granted. In respect to the place of burial, Mr. Baldwin said:

> "He died, and lies buried near that noble river which first, when a raw Yankee boy, caught his poetic eye, and stirred, by its aspect of grandeur, his sublime imagination: upon whose shores first fell his burning and impassioned words as they aroused the rapturous applause of his astonished auditors."

As long as the lawyers of Mississippi honor and respect lofty patriotism, manliness, mental integrity, oratorical genius, and outstanding legal ability, the name of Sargeant S. Prentiss will be revered.

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